SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 575

HELEN JACKSON, PETITIONER,

vs.

LYKES BROS. STEAMSHIP CO., INC.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

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[fol. 1]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS STATE OF LOUISIANA

HELEN JACKSON

VS.

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR DAMAGES DUE TO TORTIOUS DEATH ($75,000.00)

The petition of Helen Jackson, surviving widow and personal representative of Luther Jackson, brings this action against Lykes Bros. Steamship Co., Inc., for the following cause to-wit:

(1) Helen Jackson is a resident of the Parish of Orleans. And she is the sole surviving wife of the aforementioned Luther Jackson, hereinafter called the decedent.

(2) Lykes Bros. Steamship Co., Inc., is a domestic corporation authorized to do and doing business in the Parish of Orleans, State of Louisiana, engaged in shipping commerce, foreign and domestic.

(3) At all times hereinafter mentioned the respondent owned, operated, manned and/or controlled a certain vessel or certain vessels, believed upon information and belief to be named the SS MALLORY LYKES and/or the SS MARGARET LYKES, which vessel(s) were allegedly involved in the accident/ailment/illness death of the decedent.

(4) On or about February 19, 1964, the decedent was employed by the defendant as a longshoreman, assigned to work on the aforementioned vessel(s), aboard the same, engaged in cargo operations when he was caused to ingest,

inhale and/or absorb fumes, chemical and/or gases which caused, initiated, contributed to, aggravated pre-existing conditions, and/or accelerated his death.

(5) On the aforementioned date the vessel or vessel(s) was/were afloat in the navigable waters of the Mississippi River at or near the Nashville Avenue Wharf.

[fol. 2] (6) As a result of the traumatic incidents sustained by the decedent on the aforementioned vessel(s) he was confined as an inpatient to Flint Goodridge Hospital where he expired on February 23, 1964.

(7) Prior to the demise of the decedent he was a strong, sturdy man of 60, capable of earning $4500.00 per year as a longshoreman. And the petitioner, herein, anticipated and expected support from the decedent for ten or more years subsequent to the demise.

(8) The aforementioned accident/ailment and/or illness, the death of the decedent and the damages of the petitioner were caused through the negligence of the defendant, their employees, agents and/or representatives in the following manner to wit:

(a) They failed to properly contain the chemical, fumes and/or gases that escaped to injure, ail and/or do harm to the decedent;

(b) They failed to keep the vessel, its gear, cargo, appurtenances, and apparel seaworthy, safe and free of defects;

(c) They failed to make timely and proper inspections of gear, cargo, containers and/or appurtenances;

(d) They failed to inspect, contain, prepare, stow cargoes properly in the vessel(s).

(9) The petitioner avers that the decedent was a member of the crew of the aforementioned vessel(s) so as to entitle the petitioner to seek remedy herein under the provisions of the Jones Act (46 U.S.C. 688);

Or in the alternative, if this Honorable Court should so hold that the decedent was not a member of the crew, then in that alternative, it is averred that the decedent was a vicarious seaman, entitling the petitioner to seek remedy herein under the provisions of General Maritime Law and/or under the Louisiana Civil Code Articles 667, 670, 2315, 2317 and 2320.

(10) In addition to those rights and remedies, herein alleged and averred under Article (9) of this petition it is also averred that the decedent was at all times an employee of the defendant so as that the petitioner is additionally entitled to seek remedy under the Longshoreman & Harbor Worker's Act (33 U.S.C.A. 901 et seq.) and the Louisiana Workmen Compensation Act (LSA-R.S. 23:1021 et seq.).

[fol. 3] (11) To interrupt prescription under the Longshoreman & Harbor Worker's Act a copy of this petition will be mailed to the office of U.S. Deputy Commissioner, 600 South Street, N.O., La.

(12) In order to affirmatively interrupt prescription under the Louisiana Workmen Compensation Act it is specifically averred that the decedent was:

(a) An employee of the defendant, earning more than $75.00 per week;

(b) Engaged in hazardous work within the meaning of the Act;

(c) And the petitioner reserves all rights and remedies granted under the provisions of LSA—R.S. 23:1021, et seq.

(13) As a result of the foregoing accident, injury, death and damages the petitioner makes claim herein for $75,000.00.

Wherefore, the petitioner prays:

(a) That process may issue in due form of law;

(b) That she be granted a trial by jury as per the provisions of the Seventh Amendment and Fourteenth Amendment of the United States Constitution;

(c) That damages be granted in the first alternative in the amount of $75,000.00 under the Jones Act;

(d) That damages be granted in the second alternative in the amount of $75,000.00 under General Maritime Law and/or under the provisions of the Louisiana Civil Code Articles 667, 670, 2315, 2317 and/or 2320 or 2322;

(e) Or that in the third alternative that there be interruption of prescription under either the federal and/or the state workmen compensation act;

(f) And for all general and equitable relief.

Charles R. Maloney, Attorney for the Petitioner, 818 Richards Bldg., New Orleans, La., 70112.

Instructions for Service:

[fol. 4]

State of Louisiana
Parish of Orleans

Before Me, the undersigned authority, personally came and appeared: Helen Jackson who, upon first by me being duly sworn, according to law, did depose and say:

That he is the petitioner in the above and foregoing petition; that he is a citizen of the Parish of Orleans, State of Louisiana; and that he is, because of poverty and lack of means, financially unable to pay court costs in this matter or to give bond or security for costs.

Helen Jackson.

Sworn to and subscribed before me this day of January 4, 1965. Charles R. Maloney, Notary Public.

State of Louisiana
Parish of Orleans

Before Me, the undersigned authority, personally came and appeared: who, upon first by me being duly sworn, according to law, did depose and say:

That he is well acquainted with who is a citizen of the State of Louisiana, and knows his financial condition; that he is unable to pay present or future costs of this suit, or to give bond thereof, because of poverty and lack of means.

James Thornton, Sr., 3040 Montford Street.

Sworn to and subscribed before me this day of January 4, 1965. Charles R. Maloney, Notary Public.

ORDER

The foregoing petition and affidavits considered, let petitioner herein, be and he is hereby authorized and permitted to prosecute this action without payment of costs, or giving bond for costs, according to the provisions of New Orleans, Louisiana, this 6th day of January, 1965.

(Name illegible), Judge.

[fol. 5]

IN THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

[Title omitted]

EXCEPTIONS—Filed July 8, 1965

Now Comes Lykes Bros. Steamship Co., Inc., made defendant in the above entitled and numbered cause, and, appearing herein through its undersigned counsel solely

for the purpose of making the following exceptions, excepts to the petition of Helen Jackson on the following grounds:

1. The petition fails to state a right or cause of action;

2. As to the Longshoremen's and Harbor Workers' Compensation Act Claim, this Court has no jurisdiction;

3. As to the alleged Jones Act claim, the plaintiff is not the proper party to bring the action, and has no right or cause of action;

All for the reasons set forth in the annexed memorandum which is made a part hereof.

Wherefore, defendant prays that these exceptions be maintained and that the suit of Helen Jackson be dismissed at plaintiff's cost.

Terriberry, Rault, Carroll, Yancey & Farrell, By: Francis Emmett, T.A. and By: G. Edward Merritt, T.A., Attorneys for Defendant, 825 Whitney Building, New Orleans, Louisiana.

[fol. 6] Certificate of Service (omitted in printing).

[fol. 7]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

[Title omitted]

MEMORANDUM IN SUPPORT OF EXCEPTIONS—
Filed July 8, 1965

May It Please the Court:

Helen Jackson has filed suit for damages as the result of the death of her husband, Luther Jackson. The essence of her petition is Article IV thereof:

"On or about February 19, 1964, the decedent was employed by the defendant as a longshoreman, assigned

to work on the aforementioned vessel(s) aboard the same, engaged in cargo operations when he was caused to ingest, inhale and/or absorb fumes, chemicals and/or gasses which caused, initiated, contributed to, aggravated pre-existing conditions, and/or accelerated his death."

The petition seeks relief under (1) the Jones Act, (2) the Louisiana Workmen's Compensation Act, (3) the Longshoremen and Harbor Workers' Compensation Act, (4) the Louisiana Civil Code, (Articles 667, 670, 2315, 2317, and 2320), and (5) the General Maritime Law.

Defendant has taken the following exceptions to the petition:

1. *Jones Act Claim*: Since the petition alleges that the decedent was a longshoreman, there is no cause of action under the Jones Act which provides a remedy only for seamen who are either masters or members of the crew of a vessel, and not for longshoremen. 46 U.S.C.A. § 688; *Rhinehart* v. *T. Smith & Son, Inc.*, 14 So. 2d 287 (Orl. Par. Ct. of App., 1943); *South Chicago Coal and Dock Company* v. *Bassett*, 309 U.S. 251, 60 S. Ct. 544, 84 L. Ed. 732 (1939); *Swanson* v. *Marra Bros., Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946).

[fol. 8] Additionally, the Jones Act requires that the action be brought by the "personal representative" of the decedent for the benefit of the named beneficiaries. The plaintiff is not a duly qualified personal representative (which is usually the administrator or executor of the decedent's estate), and hence has no right of action. 46 U.S.C.A. § 688; *Lindgren* v. *United States*, 281 U.S. 38, 50 S. Ct. 207, 74 L. Ed. 686, (1930).

2. *Louisiana Workmen's Compensation Act Claim*: Since the decedent was working as a longshoreman aboard a vessel in navigable waters when he allegedly was exposed to the asserted noxious fumes, there is no cause of action

under the Louisiana Workmen's Compensation Act. *Ellis* v. *Travelers Insurance Co.*, 241 La. 433, 129 So. 2d 729 (1961); *Stepter* v. *T. Smith & Son, Inc.*, 241 La. 465, 129 So. 2d 740 (1961).

3. *Longshoremen and Harbor Workers' Compensation Act Claim*: This Court has no jurisdiction over a claim under the Longshoremen and Harbor Workers' Act (which is plaintiff's only possible remedy, if indeed she has any). 33 U.S.C.A. § 905. *Robinson* v. *Lykes Bros. Steamship Co., Inc.*, 170 So. 2d 243, (La. App. 1964), *cert. den.*, (1965).

4. *Louisiana Civil Code Articles*: As the subject longshoreman's death allegedly resulted from his service aboard the vessel, the longshoreman and Harbor Workers' Compensation Act is the only remedy available to the exclusion of all state laws. 33 U.S.C.A. § 905, *Rhinehart* v. *T. Smith & Son, Inc., supra; Southern Pacific Company* v. *Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917).

5. *General Maritime Law Claim*: There is no cause of action for wrongful death under the General Maritime Law. *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358, (1886); *Cortes* v. *Baltimore Insular Line, Inc.*, 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1933). *The Tungus* v. *Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959).

[fol. 9] For the foregoing reasons, it is respectfully submitted that the plaintiff's petition must be dismissed at her cost.

Terriberry, Rault, Carroll, Yancey & Farrell, By: Francis Emmett and By: G. Edward Merritt, 825 Whitney Building, New Orleans, Louisiana 70130, Attorneys for Defendant-Exceptor.

[fol. 10]

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

No. 431-099

Division "H"

Docket 4

HELEN JACKSON

vs.

LYKES BROS. STEAMSHIP CO., INC.

JUDGMENT—October 1, 1965

The exceptions herein filed on July 8, 1965, by Lykes Bros. Steamship Co., Inc., came on this day for hearing.

Present: Charles R. Maloney, attorney for plaintiff. G. Edward Merritt, attorney for exceptor.

When, after hearing the pleadings, and argument of counsel, and for the reasons orally assigned:

It Is Ordered that the exceptions of no right or cause of action; jurisdiction; and that plaintiff is not the proper party to bring the action; and has no right or cause of action, be and the same are hereby maintained, and plaintiff's suit be dismissed, at plaintiff's costs.

Judgment Read, Rendered and Signed in Open Court on October 1st, 1965.

Oliver P. Carriere, Judge.

[fol. 11]

IN THE COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

No. 2155

HELEN JACKSON

v.

LYKES BROS. STEAMSHIP CO., INC.

Appeal From the Civil District Court for the Parish of Orleans, Division "A", No. 431-099, Hon. Oliver P. Carriere, Judge.

* * *

OPINION—April 4, 1966

Godfrey Z. Regan, Judge.

* * *

(Court composed of Judges Godfrey Z. Regan, Louis H. Yarrut, and Luther E. Hall.)

[fol. 12] The plaintiff, Helen Jackson, filed this suit against the defendant, Lykes Bros. Steamship Company, Inc., endeavoring to recover the sum of $75,000.00 representing damages incurred by her as a result of the death of her husband from the inhalation of noxious gases, which she asserts was caused by the negligence of the defendant or the unseaworthiness of its steamship, upon which her husband was employed as a longshoreman.

The plaintiff requests relief under the Jones Act,[1] the Louisiana Workmen's Compensation Act,[2] the Longshore-

[1] 46 U.S.C. § 688.

[2] R.S. 23:1021, et seq.

men's and Harbor Workers' Compensation Act,[3] the Louisiana Civil Code,[4] and the general maritime law.

The defendant in response to the foregoing suit pleaded the exceptions of no right or cause of action predicated on the rationale (1) that the Jones Act provides a remedy only for seamen who are either masters or members of the [fol. 13] crew, and not for longshoremen; that (2) the Louisiana Workmen's Compensation Act does not apply to a longshoreman injured or killed aboard a vessel in navigable waters; that (3) since the Longshoremen's and Harbor Workers' Act provides the exclusive remedy in this situation, the plaintiff possessed no cause of action under the Louisiana Civil Code; and that (4) there exists no cause of action for wrongful death under the general maritime law.

In addition thereto, the defendant filed an exception to the jurisdiction of the court rationae materiae insisting that the Louisiana courts possess no jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act.

From a judgment of the lower court sustaining all of the defendant's exceptions and dismissing the plaintiff's suit, she has prosecuted this appeal.

The record reveals that the plaintiff asserted in her petition that her husband was killed as the result of the inhalation of noxious fumes or gases while in the course and scope of his employment as a longshoreman aboard the defendant's steamship. The ship was moored in the Mississippi River when the accident occurred, so that there exists no dispute as to the fact that he was working aboard in navigable waters.

Therefore, the only question posed for this court's consideration is whether the plaintiff's exclusive remedy emanates from the Longshoremen's and Harbor Workers' Act, or whether she may litigate in the state courts under

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[3] 33 U.S.C. § 901.

[4] Arts. 667, 670, 2315, 2317, 2320, 2322.

the Jones Act, the general maritime law, the Louisiana Civil Code, or the Louisiana Workmen's Compensation [fol. 14] Act.

The answer to the foregoing question is contained in 33 U.S.C. § 905, which provides that the Longshoremen's and Harbor Workers' Act is the exclusive remedy where it is applicable. This section reads:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such *employer to the employee,* his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . . "

Since the injury complained of was sustained by a longshoreman aboard a vessel located in navigable waters, the Longshoremen's Act is applicable to the exclusion of any remedies for wrongful death afforded by the Louisiana Civil Code.[5]

In view of the exclusiveness of the remedy under the Longshoremen's and Harbor Workers' Act, it has been settled that this act and the Louisiana Workmen's Compensation Act are mutually exclusive. However, situations have often arisen wherein it was difficult, if not impossible, to determine whether a particular injury was within the purview of the Louisiana Workmen's Compensation Act or the Longshoremen's and Harbor Workers' Act. In order to ease the burden on a compensation claimant in making his choice of remedies, the courts carved out an exception known as the "twilight zone" doctrine by virtue of which the injured party possessed a choice of either the federal [fol. 15] or state compensation remedy when the location of the accident could reasonably have conferred jurisdiction upon the state courts or the federal administrative agencies. However, in this case it is clear that the long-

[5] 33 U.S.C. § 903.

shoreman involved was fatally injured while working on navigable waters, and the above statute emphatically reveals that the Longshoremen's and Harbor Workers' Act is applicable to the facts hereof.[6]

The plaintiff's argument as to the applicability of the Jones Act and the general maritime law to the death of her husband is predicated primarily upon the rationale emanating from the case of Reed v. Steamship Yaka,[7] which concluded that the section of the Longshoremen's and Harbor Workers' Act quoted above making that act the exclusive remedy of a longshoreman injured aboard a vessel in navigable waters did not preclude an action by an employee against his employer for injuries sustained aboard a vessel owned by the employer. This case involved a suit under the general maritime law, predicated upon the shipowner's warranty of a seaworthy vessel.

The plaintiff argues, in effect, that the Yaka decision emasculated and rendered of no effect the exclusive remedy provision of the Longshoremen's and Harbor Workers' Act. Thus counsel for plaintiff reasons that since this section is no longer in force, a person injured as a longshoreman employed by a shipowner may pursue his remedy under the Jones Act.

[fol. 16] Our analysis of the Yaka case, however, does not support the plaintiff's contention. It is authority only for the proposition that an injured longshoreman may bring an admiralty libel under the general maritime law for injuries sustained by him aboard his employer's vessel. It does not afford a longshoreman Jones Act coverage.[8]

Finally, the plaintiff insists that she has a right to proceed against the defendant under the general maritime law.

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[6] Stepter v. T. Smith & Son, Inc., 241 La. 465, 129 So. 2d 740 (1961); Ellis v. Travelers Insurance Co., 241 La. 433, 129 So. 2d 729 (1961).

[7] 373 U. S. 410, 83 Sup. Ct. 1349 (1963).

[8] See Aycock v. Lykes Brothers Steamship Co., Inc., 236 F. Supp. 360 (D. C. Tex. 1964).

The general maritime law does not, as a rule, provide a cause of action for wrongful death.[9] However, in certain cases the Admiralty Court will look to the wrongful death statute of the state in which it sits and apply that statute to the facts posed by the particular case.

In any event, the plaintiff contends that the rationale emanating from the case of Reed v. Yaka[10] affords a remedy directly, or in personam, against the defendant for the death of her husband. In response to this argument, the defendant points to Robinson v. Lykes Brothers Steamship Co., Inc.,[11] wherein this court concluded that the exclusive remedy provision of the Longshoremen's and Harbor Workers' Act precludes an in personam action against the employer. In that case this court construed the Yaka decision as permitting merely an in rem action against the vessel owned by the employer. Counsel for the defendant asserts that such an interpretation preserves the integrity of the Longshoremen's and Harbor Workers' Act remedy and [fol. 17] also lends the proper effect to the ratio of the Yaka case.

An analysis of the Yaka case reveals language[12] which suggests that an in personam remedy may be available; the analysis likewise reveals that there exists reason for believing that the section of the Longshoremen's and Harbor Workers' Act referred to hereinabove has been taken upon the judicial anvil and hammered into an unexpected shape.

In any event, we are of the opinion that it exemplifies more judicial integrity to conclude that the rationale ema-

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[9] Cortes v. Baltimore Insular Line, Inc., 287 U. S. 367 (1932).

[10] Supra.

[11] 170 So. 2d 243 (1964).

[12] "We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury."

nating from Yaka merely permits a longshoreman to bring an action in rem against his employer in the federal court.

For the foregoing reasons, the judgment of the lower court is affirmed.

The plaintiff is to pay all costs of this proceeding.

Affirmed

[fol. 18]

IN THE COURT OF APPEAL FOR THE FOURTH CIRCUIT

STATE OF LOUISIANA

[Title omitted]

APPLICATION FOR RE-HEARING—Filed April 15, 1966

The petition of Helen Jackson, plaintiff and appellant in the above entitled and numbered cause, respectfully represents that the judgment of this Honorable Court rendered on April 4, 1966, affirming the judgment of the Civil District Court for the Parish of Orleans, Division "H", which sustained an exception of no right or cause of action and dismissed plaintiff's suit, is erroneous and contrary to law and is prejudicial to plaintiff for the following reasons:

1.

The Court is in error in holding that as a matter of law the petitioner is precluded from asserting any claim under the Jones Act (46 U.S.C. 688) as a matter of law.

2.

The Court is in error in ignoring the provisions of 33 U.S.C. 903, which reads:

> Section 3. (a) Compensation shall be payable under this Act in respect of disability or death of an em-

[File endorsement omitted]

ployee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) *and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

. . . . .

Denied May 2, 1966

[fol. 19]

3.

And after ignoring 33 U.S.C. 903, the Court is in error in assuming that 33 U.S.C. 905, as a matter of law declares the decedent, herein, *not to be* a member of the crew.

4.

And assuming the rationale of the Court with reference to the applicability of 33 U.S.C. 905 the Court remains in error in affirming the judgment that precludes a determination on the facts as to whether or not the decedent was a member of the crew and instead assumes as a matter of law that the decedent was not.

5.

The Court errs in holding that the plaintiff has no right or cause of action *in personam* against the defendant under *Reed* v. *Yaka,* and is restricted to a sole remedy under the Longshoremen's and Harbor Workers' Compensation Act.

The Court, herein, followed the erroneous reason of the U. S. Court of Appeals for the Third Circuit in *Reed* v. *Yaka,* 307 Fed. (2d) 203 (1962). The Court erred in adhering to the rationale of the Third Circuit, the Court, herein, ignored the U. S. Supreme Court, which reversed the same Third Circuit, stating:

"We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the *Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury.*" 83 Sup. Ct. 1349, 1351. (Emphasis added.)

If any further evidence were necessary to show that the Supreme Court held that the employer was personally liable and the Longshoremen's and Harbor Workers' Act was not a bar to recovery under general maritime law, it is found in the following words from *Reed* v. *Yaka*:

"We have no doubt, and indeed Pan-Atlantic admits, that, barring explicit statutory exemption, the bareboat charterer is *personally liable* for the seaworthiness of a chartered vessel, and that this liability will support a libel *in rem* against the vessel. Since the unseaworthiness of the *Yaka* is no longer in dispute, the only question is whether the Longshoreman's Act prevents recovery for Pan-Atlantic's breach of its warranty of seaworthiness." 373, U. S. 410, 413.

6.

The defendant, Lykes Bros. Steamship Company, Inc., has urged and the Court below and this Court has seized upon the footnote *obiter dicta* in *Guzman* v. *Tichirilo*, 369 U.S. 698, 1962, in an attempt to avoid the consequences of *Reed* v. *Yaka*. An examination of the *Guzman* case reveals that it is not in point, but on the contrary, with merely one in a series of cases that lead up to the holding in *Reed* v. *Yaka*. As per *Reed* v. *Yaka* (See 373 U.S. 410, 411) the shipowner is personally liable for the injury or death of a longshoreman, even though the longshoreman be a direct employee of the shipowner.

[fol. 20]

7.

Counsel for the petitioner does not argue that the *Yaka* decision emasculated and rendered of no effect the exclusive remedy features of the Longshoreman's and Harbor Workers' Act, such that this section is no longer in force. Instead, it is the position of the plaintiff that whether or not a seaman is a member of the crew is a question of fact for the jury to decide; whether or not a seaman is an employee within the meaning of the Longshoreman's and Harbor Workers' Act is a question of fact for the United States Deputy Commissioner to decide; whether or not a seaman is an employee within the meaning of the Louisiana Workmen's Compensation Act is a question of fact for a Louisiana District Court Judge to decide; after submission of evidence.

8.

Plaintiff avers that the Court is in error in following the decision of *Robinson* v. *Lykes Bros. Steamship Co., Inc.*, 170 So. 2d 243 (1964); that the same is erroneous as a representation that the *Yaka* decision restricts the remedy of a seaman to an in rem action against the vessel.

9.

The Court is in error in suggesting that the *Yaka* case only reveals language which suggests that an *in personam* remedy may be available against the shipowner, when on the contrary, in no uncertain words, throughout the holding of this case, the U. S. Supreme Court has explicitly stated that an in personam remedy is available to a seaman, even though he be a longshoreman, against the shipowner.

10.

Wherefore, petitioner prays that a re-hearing be granted in this cause and that after due proceedings had the judgment rendered herein on April 4, 1966, be set aside and re-

versed, and that there be judgment herein remanding the case for trial.

Charles R. Maloney, Attorney for plaintiff-appellant, 816 Richards Building, New Orleans, Louisiana 70112, Telephone: 522-9039.

Certificate of Counsel (omitted in printing).

[fol. 21]

IN THE SUPREME COURT

STATE OF LOUISIANA

No. .....

HELEN JACKSON

VS.

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the State of Louisiana:

This petition for a writ of certiorari to review the decision of the Court of Appeal for the Fourth Circuit is filed on behalf of Helen Jackson, plaintiff and appellant herein, who respectfully shows:

I

Statement of the Case

Luther Jackson, the decedent, was subjected to the fumes and vapors of an insecticide that escaped in the hold of a

vessel while the decedent was employed as a longshoreman aboard a vessel owned by the respondent. The inhalation of fumes, vapors and/or oxygen deficient air caused, contributed to the death of the decedent.

The surviving widow of the decedent brought suit against the respondent pursuant to the Jones Act (46 USC 688) or in the alternative pursuant to General Maritime Law and/or Louisiana Civil Code Articles 667, 670, 2315, 2317 and 2320. Or in the alternative to the foregoing pursuant to the Louisiana Workmen's Compensation Act (LSA-R.S. 23:1021, et seq.)

On July 6, 1965 Lykes Bros. Steamship Company, Inc. filed Exceptions of No Cause or Right of Action, claiming that the Longshoreman's and Harbor Workers' Act provided exclusive remedy, citing 33 U.S.C.A. 905.

On October 1, 1965, the exceptions were tried in the Civil District Court for the Parish of Orleans, Division "H", Judge Oliver P. Carriere presiding, and the exception of no cause of action was maintained.

On April 4, 1966, the Court of Appeal for the Parish of Orleans affirmed the judgment of the Civil District Court.

On May 2, 1966, an application for re-hearing was refused by the Court of Appeal. No written reasons were assigned for this refusal.

[fol. 22]

II

Questions of Law Involved

The questions of law, herein involved are:

(a) Whether or not the holding of *Reed* v. *Yaka*, 373 US 410 (1963) by the United States Supreme Court is binding on a state court forum, as it is in a federal court forum;

(b) Whether or not in the absence of any type of administrative award or procedure to determine the status of the decedent, the court can as a matter of law assume that the exclusive clause in the Longshoreman's and Harbor

Workers' Act (33 USC 902) automatically excludes the decedent from being a member of the crew;

(c) Whether or not a state court forum can, with or without (and in this case without) evidence conclude that the petitioner's remedy comes exclusively within the purview of the Longshoreman's and Harbor Workers' Act;

(d) Whether a state forum, unlike a federal forum, can assume as a matter of law that the decedent was not a member of the crew precluding remedy to the petitioner pursuant to the Jones Act 46 USC 688;

(e) Whether or not the provisions of LSA-R.S. 23:1037 are automatically unconstitutional, even though respondent has failed to urge motion or argument to that effect.

III

Assignment of Errors

1. The Court of Appeal erred in holding, contrary and in opposition to the decision of the Supreme Court of the United States in *Reed* v. *Yaka,* 373 U.S. 410 (1963), that a longshoreman does not have a cause of action *in personam* against the shipowner for injuries due to the unseaworthiness of the vessel.

2. The Court of Appeal erred in holding that there could be *in rem* liability without *in personam* liability.

3. The Court of Appeal erred in applying the holding of *Ellis* v. *Travelers Insurance Co.,* 241 La. 433, 129 So. (2d) 729 (1961), as authority for barring a longshoreman from seeking damages against a shipowner for injuries due to an unseaworthy vessel.

4. The Court of Appeals erroneously assumed that the issue presented herein was identical with that presented in *Ellis* v. *Travelers Ins. Co.,* 241 La. 433, 129 So. 2d 729 (1961).

5. The Court of Appeals erroneously assumed that the exclusion clause in the Longshoreman's and Harbor Workers Act (33 USC 902) rules out a longshoreman from being a member of the crew.

[fol. 23] 6. The Court of Appeals first correctly stated that Civil District Court for the Parish of Orleans had no jurisdiction, whatsoever, to ascertain whether or not the petitioner was entitled to remedy pursuant to the Longshoreman's and Harbor Workers' Act, but in spite of this restriction decided that the petitioner's "exclusive" remedy was pursuant to the Federal Workmen's Compensation Act.

7. The Court of Appeals assumed that as a matter of law the decedent could not be a member of the crew.

8. The Court of Appeals assumed that the provisions of LSA-R.S. 23:1037 were unconstitutional, even though no motion or argument, whatsoever, was urged by the respondent to that effect.

9. The Court of Appeals erroneously assumed that the factual problem herein, was identical with that presented in *Robinson* v. *Lykes Bros. Steamship Co., Inc.,* 170 So. 2d 243 (La. App 1964) cert den (1965), and thereafter applied the erroneous holding of the Robinson case herein.

10. The Court of Appeals assumed erroneously that as a matter of law the petitioner had no right of action for the death of her husband.

IV

Argument on Assignment of Error No. 1

In *Reed* v. *Yaka,* 373 U.S. 410 (1963), the United States Supreme Court explicitly held that a longshoreman could seek remedy against a shipowner, pursuant to General Maritime Law, for the breach of the warranty of seaworthiness, notwithstanding that the shipowner was the direct employer of the longshoreman. In rendering this decision

the United States Supreme Court abandoned the literal reading of 33 U.S.C. 905 and refused to apply the "exclusiveness of remedy" clause in favor of that shipowner who chose to act simultaneously as a shipowner and stevedore.

Lykes Bros. Steamship Co., Inc. is a shipowner typically identified in *Reed* v. *Yaka, supra,* acting simultaneously as shipowner and as stevedore. The members of the crew are employed directly by Lykes Bros. Steamship Co., Inc. and the longshoremen are employed directly by Lykes Bros. Steamship Co., Inc.

Thus, the decision of *Reed* v. *Yaka* is pointed directly to shipowners such as the defendant:

> ". . . that a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts and that the shipowner's obligation is rooted, not in contracts, but in the hazards of the work . . . In the light of this whole body of law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan Atlantic was not only an employer of the longshoreman but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid." 83 Sup. Ct. 1353.

[fol. 24] The defendant, Lykes Bros. Steamship Co., Inc., alleges that *Reed* v. *Yaka* relieves them of personal liability. However, the United States Supreme Court under the same set of facts stated that there was personal liability, as follows:

> ". . . We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the Court of Appeals erred in holding that Pan

Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury." 83 Sup. Ct. 1351.

The United States Supreme Court pointed out further that the species of liability represented by a breach of the warranty of seaworthiness was "humanitarian" in nature:

". . . In *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85 (1946), we held that a shipowner's warranty of seaworthiness extends to longshoremen . . . In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the *'humanitarian policy'* of the doctrine of seaworthiness." 83 Sup. Ct. 1352. (Emphasis ours.)

Somehow in the shuffle of the instant case the "humanitarian policy" has been lost.

It should be noted that *Reed* v. *Yaka* is not the first assault of the Supreme Court on the exclusiveness provisions of the LHWA (33 U.S.C.A. 905). As pointed out by the Court in the *Reed* case:

"Ten years later (after *Sieracki*), in *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Corp.,* 350 U.S. 124 (1956), we were faced with the question of whether a shipowner who was forced to pay damages to a longshoreman injured . . . could recover indemnity from the stevedoring company for whom the longshoreman worked . . . the Court held that the stevedoring company was liable over to the shipowner . . . The Court was not convinced by arguments that its result made the economic burden of the longshoreman's recovery fall on the stevedoring employer contrary to the purpose of the Act." 83 Sup. Ct. 1352.

And further explaining its position, which comes pointed on all fours to the instant case, the Court had this to state:

> "Thus there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury from the owner who could have then under *Ryan* shifted the burden of the recovery to petitioner's stevedoring employer." 83 Sup. Ct. 1352.

[fol. 25] None of ~~the~~ foregoing from *Reed* v. *Yaka* was explained, quoted, qualified or distinguished by the Court below. We submit *Reed* v. *Yaka* is squarely in point with the instant case, representing authority that the instant petitioner has a valid cause of action against Lykes Bros. Steamship Co., Inc., as further witness note the following statement of the United States Supreme Court:

> "Yet the Court of Appeals held, and Pan Atlantic would have us hold, that petitioner must be completely denied the traditional and basic protection of the warranty of seaworthiness simply because Pan Atlantic was not only the owner pro hac vice of the ship but also petitioner's employer. In making this argument, Pan Atlantic has not and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company." 83 Sup. Ct. 1352.

Substitute Lykes Bros. Steamship Co., Inc. for Pan Atlantic for the foregoing quotation, and we have the instant case. There is no distinction.

Nevertheless since the Court of Appeals, in the instant case, referred to the literal meaning of 33 U.S.C.A. 905, we should refer back to *Reed* v. *Yaka, supra,* and examine what the United States Supreme Court stated:

"Pan Atlantic relies simply on the literal wording of the statute, and it must be admitted that the statute on its face lends support to the Pan Atlantic construction. But we cannot now consider the wording of the statute alone. We must view it in the light of our prior cases in this area, like *Sieracki*, *Ryan* and others, the holdings of which have been left unchanged by Congress. In particular, we pointed out several times in the *Sieracki* case, which has been consistently followed since, that a shipowner's obligation of seaworthiness cannot be shifted about, limited or escape by contracts or by the absence of contracts, and that the shipowner's obligation is rooted, not in contracts, but in the hazards of the work." 83 Sup. Ct. 1353.

Moreover, the history of cases decided by the United States Supreme Court does not support a literal interpretation of the statute.*

[fol. 26]

V

Argument on Assignment of Error No. 2

The Supreme Court of the United States stated in *Guzman* v. *Pichirilo*, 369 U.S. 698 (1962), that there could *be*

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* *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946) extended the doctrine of seaworthiness to longshoremen, even though the longshoreman was not a member of the crew, and in spite of the fact that the longshoreman was entitled to compensation benefits under the Longshoreman's and Harbor Workers' Act. *Ryan Stevedoring Co.* v. *Pan Atlantic S.S. Co.*, 350 U.S. 124 (1956) recognized the shipowner's right of action against the stevedoring company, for the negligence of the stevedoring company, claiming indemnity over, in spite of the fact that the stevedoring company was statutorily liable for compensation benefits to the same injured longshoreman. Also see *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406 (1953); *Alaska S.S. Co.* v. *Peterson*, 347 U.S. 984 (1954); *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959); *Meyerhaeuser S.S. Co.* v. *Nacierema Operating Co.*, 355 U.S. 563 (1958); and *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960).

no in rem liability without in personam liability. The Court below reversed this and held there could be *in rem* liability without *in personam* liability. See Opinion of Court below.

We submit that there can never be an action against a thing without some underlying action against a person for damages. On this score, we have a decision of the Supreme Court of the United States to back us up, and we are certainly willing to rely on that authority.

VI

Argument on Assignment of Error No. 3

The case of *Ellis* v. *Travelers Insurance Co.*, 241 La. 433, 129 So. (2d) 729 (1961), relied on by both courts below, is not applicable to the instant case. The *Ellis* case, *supra*, involved the conflicts of the "twlight zone," i.e., whether the Louisiana Workmen's Compensation Act applied exclusively and/or concurrently to the injury of a longshoreman sustained aboard a vessel over navigable waters. This is not a "twlight zone" case.

VII

Argument on Assignment of Error No. 4

The Courts below relied on *Ellis* v. *Travelers Insurance Co.*, 241 La. 433, 129 So. 2d 729 (1961) and *Stepter* v. *T. Smith & Sons, Inc.*, 241 La. 465, 129 So. 2d 740 (1961) as authority that the petitioner has no claim under the Workmen's Compensation Act for the State of Louisiana. In doing so, the Courts below ignored these distinguishing features that are contrary in the instant case:

(a) In the *Ellis* and *Stepter* case, unlike the instant case, the employer of the longshoreman was not a shipowner;

(b) In the *Ellis* and *Stepter* case, the longshoreman could not make claim against the shipowner under the Jones Act, 46 USC 688, because there was no

direct employee/employer relationship between the shipowner and longshoreman;

(c) The shipowner in the *Ellis* and *Stepter* cases were foreign non-domestic companies; and in the *Ellis* and *Stepter* cases the shipowners were not involved in the issues;

(d) In the instant case the shipowner is a named defendant, employing the longshoreman direct;

(e) In the instant case the shipowner is a Louisiana domiciled corporation, which corporation specifically comes within the purview of the Louisiana Courts;

[fol. 27] (f) In the instant case there is a direct employee-/employer relationship between the longshoreman and the shipowner;

(g) In the *Stepter* and *Ellis* cases compensation benefits to the longshoremen were not denied under the Federal Act; instead, they were conceded;

(h) Traumatic or moving forces were involved in the *Ellis* and *Stepter* injuries which clearly placed the injuries within the purview of the Federal Act; but in the instant case there is question as to whether or not the ailment of the decedent comes within the purview of the Federal Act.

In view of the foregoing points of disparity between the *Stepter* and *Ellis* cases with the instant case, it is strange that the respondent or the Court below would even mention the same. At the least, these prior cases cannot stand for law in this instant case.

VIII

Argument on Assignment of Error No. 5

The Court of Appeals failed to take cognizance of the fact that a longshoreman is a seaman. *Seas Shipping Co.*

v. *Sieracki* (1946) 328 US 85, is not the first instance that the United States Supreme Court declared that longshoremen were entitled to be assimilated to the seaman's remedy of damages for personal injuries arising from the shipowner's failure to furnish a seaworthy vessel. A longshoreman injured in the case of *International Stevedore Co.* v. *Haverty* (1926) 272 US 50. In this case (Haverty), the longshoreman, was not only declared to be a seaman but was declared to be a seaman/member of the crew, coming within the purview of the Jones Act.

It was no accident that "Haverty" was declared to be a member of the crew, eligible to seek remedy pursuant to the Jones Act. "Haverty" was one of those few longshoremen employed *direct* by the shipowner. "Haverty", like "Yaka" and like the instant "Luther Jackson" were all employed directly by the shipowner. In this respect they meet the test of being eligible to seek remedy pursuant to the Jones Act. And contrary, in spite of and in opposition to the Court of Appeals misquote of the petitioner/appellant's argument below it is not the contention herein that the "Longshoreman's and Harbor Workers' Act has been emasculated". The overwhelming majority of longshoremen are *not* employed direct by shipowners, and if they are *not* employed direct by the shipowner they are precluded from seeking remedy from the shipowner pursuant to the Jones Act.

Of course, the case of Haverty did not offer remedy for most longshoremen, since the greater number of longshoremen, unlike Haverty and the instant decedent (Jackson), worked for independent contractors who are not shipowners. Since stevedores or stevedoring companies are rarely shipowners, the case of Haverty offered no remedy to the regular longshoremen. Thus, the longshoreman's and Harbor Workers' Act was enacted to give remedy to those longshoremen who were not eligible to make claim against their employers pursuant to Jones Act.

[fol. 28] The Longshoreman's and Harbor Workers' Act was not enacted to take away or restrict rights and reme-

dies of longshoremen. The Federal Act was enacted to give rights and remedies to longshoremen, since in 1927, the great mass of longshoremen were denied remedy under State Workmen's Compensations acts and were generally denied rights under the Jones Act. The *Haverty* case only afforded remedy for those longshoremen who could qualify as direct employees of the shipowners. Since most longshoremen worked for stevedores and not shipowners, the aforementioned *Haverty* case was little or no relief to longshoremen at large. (Of course, the decedent, herein, qualified pursuant to the aforementioned Haverty case.)

The aforementioned Longshoreman's and Harbor Workers' Act (33 USC 901, et seq.) does not deny the members of the crew rights afforded under the Jones Act (46 USC 688). Instead, the exclusion (33 USC 902) applies as follows:

> "The term 'employee' does not include any master or member of the crew of any vessel, nor any person engaged by the master to load or unload or repair any vessel under eighteen tons net"

The Longshoreman's and Harbor Workers' Act excludes members of crews from the purview of the act. If the longshoreman is a member of the crew, then he is excluded from the Federal Workmen's Compensation Act. *However, that is not identical with stating that a longshoreman has no right of remedy under the Jones Act.*

The holding of the Court of Appeals in the instant case is to the effect that a longshoreman as a matter of law is precluded from remedy under the Jones Act. The Jones Act, 46 U.S.C. 688, will not support such a view.

IX

Argument on Assignment of Error No. 6

The Court below first stated correctly that it had no jurisdiction to ascertain whether or not the petitioner was entitled to remedy pursuant to the Longshoreman's and

Harbor Workers' Act, but then the Court ignored this limitation by alleging that the petitioner's remedy was "exclusively" confined to the provision of the Longshoreman's and Harbor Workers' Act.

The Longshoreman's and Harbor Workers' Act specifically provides that the term "employee" as applied pursuant to the act, "does not include any master or member of the crew". See 33 USC 903.

Whether or not the decedent was an "employee" within the meaning of the Longshoreman's and Harbor Workers' Act is a matter for the determination of the United States Deputy Commissioner of the Department of Labor, 33 USC 919. And if he had a determination and if there had been no timely appeal, then the determination by the U. S. Deputy Commissioner would serve as conclusive evidence as to whether or not the decedent was an "employee" within the meaning of the act (or conversely is not a member of the crew) *Desper* v. *Starved Rock Ferry Company,* (1952) 342 US 187, 72 S Ct. 216.

[fol. 29] But the United States Deputy Commissioner has made no determination, whatsoever, with reference to whether or not the decedent was an "employee" within the meaning of the act.

The State Court do not possess jurisdiction to ascertain whether or not the decedent was an employee within the meaning of the Federal Act.

X

Argument on Assignment of Error No. 7

The Court below ignored the law, plainly and persistently, stated by the United States Supreme Court to the effect that whether or not an employee is a member of the crew, entitled to remedy under the Jones Act, is a question of fact to be tried by the jury. This is basic, but the Court below ignored the same. Whether one injured aboard a vessel is a seaman and entitled to the Jones Act remedy is a *question of fact* which must be determined by the trier

of the facts, 46 USC 688; *Desper* v. *Starved Rock Ferry Company* (1952) 342 US 187, 72 S Ct. 216; And when a case is to be tried by a jury, as the instant case, it is a question of fact for the jury to determine. The determination of whether the decedent was a seaman should not be taken from the jury by the trial judge if there is any evidentiary basis for the jury to determine. *Grimes* v. *Raymond Concrete Pile Company,* (1957) 356 US 252, 78 S Ct. 687. *Gianfala* v. *Texas Co.,* 350 US 879 (1955); *Senko* v. *LaCrosse Dredging Corp.,* 352 US 370 (1957) rehearing denied, 353 US 931 (1957); *Braniff* v. *Jackson Ave. Gretna Ferry, Inc.,* 280 F. 2d 523, (CA 5th 1960); *Offshore Company* v. *Robinson,* 266 F 2d 769 (CA 5th 1959); *Butler* v. *Whitman,* (1957) 356 US 271, 78 S Ct. 734; *McKie* v. *Diamond Marine Co.,* 204 F 2d 132 (CA 5th 1953).

XI

Argument on Assignment of Error No. 8

Since the instant defendant is a Louisiana domiciled corporation, the petitioner has herein made specific claim against the respondent pursuant to the provisions of LSA —R.S. 23: 1037, which pertinent part reads:

> "... but nothing in this Chapter shall be construed to apply to any work done on, nor shall any compensation be payable to the master, officers or members of the crew of, any vessel used in interstate or foreign commerce not registered or enrolled in the State of Louisiana." (Emphasis ours).

In all prior proceedings no evidence, whatsoever, was introduced to indicate that the vessels involved were not registered or enrolled in Louisiana or that Lykes Bros. Steamship Co., Inc. was not a domestic, Louisiana corporation. Moreover, no argument, whatsoever, was introduced or urged that the foregoing quoted section of this statute was unconstitutional. Apparently, the Court below

operated on a pre-conceived notion that the same was unconstitutional.

[fol. 30] In the light of the quoted provisions the legislature of the State of Louisiana has heretofore enacted special provision to cover under the Louisiana Workmen's Compensation Act those employees of shipowners, when those shipowners are domiciled in this state and enroll and register their vessels in this state.

This is a statute enacted by the legislature for the State of Louisiana. It should be given presumptive validity as opposed to pre-conceived unconstitutionality.

Since the respondent did not offer any evidence to the contrary, or even challenge argument in the least it must be assumed as a matter of fact for this particular case that Lykes Bros. Steamship Co., Inc. is a Louisiana corporation and the vessels involved are registered and enrolled in the State of Louisiana. Accordingly, pursuant to the specific provision (as quoted) of the state statute, the petitioner should be entitled to remedy herein under this statute.

The particular provisions of this statute have not been revoked. It is submitted the Court below should presume its validity, and not pre-conceived its non-constitutionality.

XII

Argument on Assignment of Error No. 9

The facts of the instant case do not represent the facts of *Robinson* v. *Lykes Bros. Co., Inc.*, 170 So. 2d 243 (La. App. 1964), Cert. Den. (1965). The defendant shipowner is the same and the Court and division where originally filed is the same. However, there are the following differences:

(a) A traumatic injury was involved in the Robinson case;

(b) Compensation pursuant to the federal act was voluntarily paid by the respondent in the Robinson case;

(c) The United States Deputy Commissioner for the federal act made an administrative determination of Robinson's status under the act;

(d) Robinson voluntarily conceded that his employment came within the purview of the federal act;

(e) The issue as to whether or not Robinson was a member of the crew, entitled to remedy under the Jones Act, 46 U.S.C. 688, was abandoned by Robinson;

(f) The Robinson case involved the sole issue as to whether or not the longshoreman could make claim against the shipowner in State Court, as he can in Federal Court, pursuant to *Reed* v. *Yaka,* 373 US 410 (1963).

The facts and the issue of the *Robinson* case does not parallel the instant case. This is a different case. [fol. 31] And notwithstanding the foregoing, the petitioner avers that the holding in *Robinson* v. *Lykes Bros. Steamship Co., Inc.,* supra, in erroneous. The decision in the *Robinson* case was rendered contrary and in spite of the case *Reed* v. *Yaka,* 373 US 410 (1963). *Reed* v. *Yaka,* supra is the law. This is the law as designated by the United States Supreme Court. *Robinson* is out of harmony with the expression of the United States Supreme Court.

XIII

Argument on Assignment of Error No. 10

The Jones Act, 46 USC 688, as supplemented by the Federal Employee's Liability Act (FELA), 45 USC 51-59, affords the petitioner a right of action for the death of her husband. And even, assuming that the petitioner is denied a right of action under the Jones Act she has a right of action pursuant to the Louisiana Civil Code Article, 2315. Assuming she has no right of action under the Jones Act, the petitioner has a right, via use of the local (state)

statute for wrongful death and survivorship on the basis of negligence and unseaworthiness. See *Tungus* v. *Skovgaard,* 358 US 588 (1959); Also see *United N. Y. and N. J. Sandy Hook Pilots Assn.* v. *Halecki,* 358 US 613 (1959); *Hess* v. *United States,* 361 US 314 (1960) and *Goett* v. *Union Carbide Corp.,* 361 US 340 (1960).

XIV

Petitioner annexes hereto the following documents:

(a) A copy of the petition and exceptions and answer filed in the Court of original jurisdiction;

(b) A copy of the opinion rendered by the Court of Appeal;

(c) A copy of the application for rehearing, and petitioner declares that rehearing was refused on May 2, 1966;

(d) Copies of all briefs filed in the Court of Appeal.

Wherefore, the premises considered, petitioner prays that a writ of certiorari be issued herein directing this Honorable, the Judges of the Court of Appeal, Fourth Circuit, State of Louisiana, to send up to Your Honors the entire record in the case aforesaid to the end that the same may be examined and the judgment reversed and the case remanded to the District Court for trial on the merits.

Petitioner further prays for all general and equitable relief, and for all such further orders of the Court as may be just, equitable, legal and permissible under the circumstances.

Charles R. Maloney, Attorney for the petitioner, 816 Richards Building, New Orleans, Louisiana 70112, Telephone: 522-9039.

[fol. 32] Certificate of Counsel (omitted in printing).

[fol. 33]

IN THE SUPREME COURT OF LOUISIANA

[Title omitted]

ORDER REFUSING WRIT OF CERTIORARI—June 21, 1966

Writ refused. We find no error of law in the judgment of the Court of Appeal.

WBH, JBF, JBH, FWH, FHMcC.

Sanders, J., and Summers, J., are of the opinion that a writ should be granted. See Robinson v. Lykes Bros., 247 La. 481, 172 So. 2d. 292.

A True Copy, Clerk's Office, Supreme Court of Louisiana, New Orleans, June 21, 1966.

Harold A. Moise, Jr., Deputy Clerk.

[fol. 34] Clerk's Certificate (omitted in printing).

[fol. 35]

SUPREME COURT OF THE UNITED STATES

No. .....—October Term, 1966

HELEN JACKSON, Petitioner,

vs.

LYKES BROS. STEAMSHIP CO., INC.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon Consideration of the application of counsel for petitioner,

It Is Ordered that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 17th, 1966.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 16th day of September, 1966.

[fol. 36] SUPREME COURT OF THE UNITED STATES

No. 575—October Term, 1966

HELEN JACKSON, Petitioner,

vs.

LYKES BROS. STEAMSHIP CO., INC.

ORDER ALLOWING CERTIORARI—December 5, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of Louisiana is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. _____

HELEN JACKSON

versus

LYKES BROS. STEAMSHIP CO., INC.

PETITION FOR WRIT OF CERTIORARI TO REVIEW THE DECISION OF THE SUPREME COURT OF LOUISIANA

Helen Jackson, the petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Louisiana, entered in the above-entitled case on June 21, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Judge of the Civil District Court, Parish of Orleans, printed in Appendix D was unreported. The opinion of the Fourth Circuit Court of Appeal, State of Louisiana, printed in Appendix C hereto, is reported at 185 So 2d 342. The opinion of the same Fourth Circuit Court of Appeal, denying a rehearing, printed in Appendix B hereto, is

not reported. The opinion of the Supreme Court of Louisiana denying a writ of certiorari printed in Appendix A hereto, is reported in 187 So 2d 441.

JURISDICTION

The judgment of the Supreme Court of Louisiana denying a writ of certiorari, or writ of review, to the Court of Appeal, Fourth Circuit of the State of Louisiana, was denied on June 21, 1966, printed in Appendix A hereto. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

(1) Whether there can be in rem liability of a vessel to a seaman/longshoreman when there is no in personam liability of the shipowner/operator of the vessel, for breach of the warranty of seaworthiness.

(2) Is the right of trial by jury guaranteed by the Jones Act (46 U.S.C. 688) and the Seventh Amendment of the United States Constitution waived in a State Court forum?

STATUTES INVOLVED

(1) Sections (33 U.S.C. 902, 903 and 905) of the Longshoremen's and Harbor Workers' Compensation Act. They are printed in Appendix E.

(2) The Jones Act (46 U.S.C. 688). It is printed in Appendix F.

(3) The Seventh Amendment of the the United States Constitution.

(4) The warranty of seaworthiness pursuant to General Maritime Law.

STATEMENT OF THE CASE

On February 19, 1964, Luther Jackson, while employed as a longshoreman, was subjected to fumes and vapors of an insecticide escaping in the hold of a vessel owned and operated by Lykes Bros. Steamship Co., Inc. And as a result of the same, Luther Jackson died. (R. 49-51) In the instant cause, Lykes Bros. Steamship Co., Inc. acted simultaneously in the dual capacity of ship operator and stevedore, operating the vessel and directly employing the decedent. (R. 49-51). On January 6, 1965, the widow of the decedent filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking remedy under the Jones Act (46 U.S.C. 688) or in the alternative pursuant to General Maritime Law, praying for trial by jury. (R. 49-51) In response, the shipowner filed exceptions of no cause of action and no right of action alleging that the Longshoremen's and Harbor Workers' Act provided exclusive remedy, if there was any remedy, for the widow of the decedent. (R. 44-47) On October 1, 1965, the Civil District Court for the Parish of Orleans, ignoring the holding of Reed v. Yaka, (1963) 373 U.S. 410, 83 S Ct 1349, and additionally ignoring the provisions of the Jones Act, maintained the exceptions of the shipowner, dismissing the action of the petitioner, which opinion is

printed in Appendix D hereto. (R. 36) On April 4, 1966, the Fourth Circuit Court of Appeal for the State of Louisiana affirmed the decision of the lower court, alleging that the petitioner only had an in rem remedy in a non state forum and had no in personam remedy against the shipowner in any forum, which opinion is printed in Appendix C hereto. (R. 17-23) On May 2, 1966, an application for rehearing was refused by the Fourth Circuit Court of Appeal for the State of Louisiana (R. 13). And on June 21, 1966, the Supreme Court of Louisiana denied an application for a writ of certiorari, finding no error of law in the prior judgment, which opinion is printed in Appendix A hereto.

REASONS FOR GRANTING WRIT

1. The decision of the court below in the instant case -- like the Court's decision in Robinson v. Lykes Bros. Steamship Co., Inc. (1965) 247 La 481, 172 So 2d 292 -- is erroneous and in direct conflict with the holding of Reed v. Yaka (1963) 373 U.S. 410, 83 S Ct 1349. In Reed v. Yaka, supra, abandoning the literal reading of the "exclusive clause" of 33 U.S.C. 905 of the Longshoremen's and Harbor Workers' Compensation Act, the U. S. Supreme Court explicitly held that a longshoreman could seek remedy against a shipowner pursuant to General Maritime Law, for the breach of warranty of seaworthiness, notwithstanding that the shipowner was the direct employer of the longshoreman. However, in the instant case

and in the Robinson case, supra, the Supreme Court of Louisiana refuses to follow the same.

Contrary and in opposition to the same, Reed v. Yaka, the Supreme Court of Louisiana and its lower courts hold that a longshoreman does not have a cause of action in personam against the shipowner. This lack of harmony between the State Court holdings and that of Reed v. Yaka are best illustrated in the appellate opinion of the instant case, 185 So 2d 342, 345, also printed in Appendix C hereto:

> ...
>
> An analysis of the Yaka case reveals language which suggests that an in personam remedy may be available; the analysis likewise reveals that there exists reason for believing that the section of the Longshoremen's and Harbor Workers' Act referred to hereinabove has been taken upon the judicial anvil and hammered into an unexpected shape.
>
> In any event, we are of the opinion that it exemplifies more judicial integrity to conclude that the rationale emanating from Yaka merely permits a longshoreman to bring an action in rem against his employer in the federal court. (Emphasis ours)

Thus, the Supreme Court of Louisiana has twice held in Robinson and the instant case

that there can be in rem liability of a vessel where there is no corresponding in personam liability of the shipowner/operator. This is erroneous and contra to Reed v. Yaka, supra, and Guzman v. Pichirilo (1962) 369 U.S. 698, 82 S Ct. 1095.

2. In deciding the instant case, as well as Robinson v. Lykes Bros. Steamship Co., Inc. (1965) 247 La., 481, 172 So 2d 292, the district, appellate and highest court of Louisiana relied heavily on decisions in Stepter v. T. Smith & Son, Inc. (1961) 241 La. 465, 129 So 2d 740 and Ellis v. Travelers Ins. Co. (1961) 241 La. 433, 129 So 2d 729, both of which involved longshoremen suing non shipowner employers for benefits under the Louisiana Workmen's Compensation Act. However, the issues as presented in Ellis and Stepter are grossly distinguishable in the following:

(a) Ellis and Stepter were longshoremen suing stevedore employers for state compensation benefits;

(b) The stevedore employers of Ellis and Stepter did not own or operate the vessels involved;

(c) No issue of the warranty of seaworthiness or the Jones Act were involved in the remedy sought by Ellis and Stepter;

(d) The claims for state compensation

benefits by Ellis and Stepter came subsequent to a federal award and payment of federal benefits under the federal act.

(e) No monies of any kind have been paid to the widow of Luther Jackson.

It is submitted that the aforementioned Stepter and Ellis cases have a rightful place in the history of the "twilight doctrine" with cases such as Southern Pacific Co. v. Jensen, (1917) 244 U.S. 205, 37 S Ct 524 and Davis v. Department of Labor (1942) 317 U.S. 249, 63 S Ct 225. However, the same Stepter and Ellis cases are inapplicable herein, to the instant case, as to the issue of whether or not the widow of the decedent longshoreman has a cause of action against the shipowner for the breach of the warranty of seaworthiness.

3. The courts of Louisiana assumed without testimony, affidavit or any type of evidence that the decedent, as a matter of law, was not and could not be a member of the crew. In spite of the provisions of the Jones Act and the Seventh Amendment, guaranteeing the petitioner a trial by jury, as prayed, the issue of whether or not the decedent was a member of the crew, entitling his widow to seek remedy pursuant to the Jones Act was decided summarily by judge, and in the instance of the district court judge, on the basis of Stepter v. T. Smith & Son, Inc. (1961) 241 La 433, 129 So 2d 740, and Ellis v. Travelers Ins. Co.

(1961) 241 La 433, 129 So 2d 727. And it is unknown as to what prompted the Fourth Circuit Court of Appeal and the Supreme Court of Louisiana to confirm the district court, as no verbal or written opinions were given, except that during verbal argument, the Appellate Court reminded counsel for the petitioner that any Appellate Court of the State of Louisiana by state statute (Louisiana Code of Civil Procedure, Article 2082, printed in Appendix G hereto) could reverse any opinion rendered by any civil jury. And apparently, since the petitioner's cause of action has been dismissed, the judgment of the Appellate and Supreme Court of Louisiana apparently represents a holding that even if some evidence had been submitted to make a determination and even if the jury had found, as a matter of fact, that the decedent was a member of the crew, then the Appellate Court would automatically reverse the decision.

The petitioner submits the holding of the Supreme Court of Louisiana and its lower State courts is contra to the Jones Act (46 U. S. C. 688) and a history of U. S. Supreme Court cases on this same point.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES R. MALONEY
Attorney for the Petitioner
816 Richards Building
New Orleans, Louisiana 70112
Telephone: 522-9039

PROOF OF SERVICE

I, Charles R. Maloney, attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served copies of the foregoing Petition for Writ of Certiorari on Mr. Edward Merritt, Counsel for Respondent by mailing a copy thereof, postage prepaid, addressed to his office at 825 Whitney Bank Building, New Orleans, Louisiana 70130.

Dated this_____day of September, 1966.

CHARLES R. MALONEY

APPENDIX (A)

SUPREME COURT OF LOUISIANA

New Orleans, 70112

No. 48,229 June 21, 1966

Helen Jackson

v.

Lykes Bros. Steamship Co., Inc.

In re: Helen Jackson applying for certiorari, or writ of review, to the Court of Appeal, Fourth Circuit, Parish of Orleans

---

Writ refused. We find no error of law in the judgment of the Court of Appeal.

/s/ WBH
/s/ JBF
/s/ JBH
/s/ FWH
/s/ EHMcC

SANDERS, J., and SUMMERS, J., are of the opinion that a writ should be granted. See Robinson v. Lykes Bros. 247 La. 481, 172 So. 2d 292.

A TRUE COPY
Clerk's Office
Supreme Court of Louisiana
New Orleans
June 21, 1966

/s/ Harold A. Moise, Jr.
Deputy Clerk

****

APPENDIX (B)

COURT OF APPEAL, FOURTH CIRCUIT

STATE OF LOUISIANA

Clerk's Office, New Orleans, May 2, 1966

Dear Sir:

Rehearing was this day refused in the case entitled: JACKSON v. LYKES BROS. STEAMSHIP CO., INC.

No. 2155

Very truly yours,

M. J. Keenan; Clerk

APPENDIX (C)

Helen Jackson	*	No. 2155
	*	Court of Appeal
v.	*	
	*	Fourth Circuit
Lykes Bros. Steamship Co., Inc.	*	State of Louisiana
	*	

* * * * * * *

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION "A", NO. 431-099, HON. OLIVER P. CARRIERE, JUDGE

* * * *

GODFREY Z. REGAN

Apr. 4, 1966 JUDGE

(Court composed of Judges Godfrey Z. Regan, Louis H. Yarrut, and Luther E. Hall.)

CHARLES R. MALONEY
For Plaintiff-Appellant

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
WILLIAM E. WRIGHT
G. EDWARD MERRITT,
For Defendant-Appellee

AFFIRMED

The plaintiff, Helen Jackson, filed this suit against the defendant, Lykes Bros. Steamship Company, Inc., endeavoring to recover the sum of $75,000.00 representing damages incurred by her as a result of the death of her husband from the inhalation of noxious gases, which she asserts was caused by the negligence of the defendant or the unseaworthiness of its steamship, upon which her husband was employed as a longshoreman.

The plaintiff requests relief under the Jones Act, [1] the Louisiana Workmen's Compensation Act, [2] the Longshoremen's and Harbor Workers' Compensation Act, [3] the Louisiana Civil Code, [4] and the general maritime law.

The defendant in response to the foregoing suit pleaded the exceptions of no right or cause of action predicated on the rationale (1) that the Jones Act provides a remedy only for seamen who are either masters or members of the crew, and not for longshoremen; that (2) the Louisiana Workmen's Compensation Act does not apply to a longshoreman injured or killed aboard a vessel in navigable waters; that (3) since the Longshoremen's and Harbor Workers' Act provides the exclusive remedy in this situation, the plaintiff possessed no cause of action under the Louisiana Civil Code;

1. 46 U.S.C. Section 688.
2. R.S. 23:1021, et seq.
3. 33 U.S.C. Section 901
4. Arts. 667, 670, 2315, 2317, 2320, 2322

and that (4) there exists no cause of action for wrongful death under the general maritime law.

In addition thereto, the defendant filed an exception to the jurisdiction of the court rationae materiae insisting that the Louisiana courts possess no jurisdiction under the Longshoremen's and Harbor Workers' Compensation Act.

From a judgment of the lower court sustaining all of the defendant's exceptions and dismissing the plaintiff's suit, she has prosecuted this appeal.

The record reveals that the plaintiff asserted in her petition that her husband was killed as the result of the inhalation of noxious fumes or gases while in the course and scope of his employment as a longshoreman aboard the defendant's steamship. The ship was moored in the Mississippi River when the accident occurred, so that there exists no dispute as to the fact that he was working aboard in navigable waters.

Therefore, the only question posed for this court's consideration is whether the plaintiff's exclusive remedy emanates from the Longshoremen's and Harbor Workers' Act, or whether she may litigate in the state courts under the Jones Act, the general maritime law, the Louisiana Civil Code, or the Louisiana Workmen's Compensation Act.

The answer to the foregoing question

is contained in 33 U.S.C., Section 905, which provides that the Longshoremen's and Harbor Workers' Act is the exclusive remedy where it is applicable. This section reads:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

Since the injury complained of was sustained by a longshoreman aboard a vessel located in navigable waters, the Longshoremen's Act is applicable to the exclusion of any remedies for wrongful death afforded by the Louisiana Civil Code.[5]

In view of the exclusiveness of the remedy under the Longshoremen's and Harbor Workers' Act, it has been settled that this act and the Louisiana Workmen's Compensation Act are mutually exclusive. However, situations have often arisen wherein it was difficult, if not impossible, to determine whether a particular injury was within the purview of the Louisiana Workmen's Compensation Act or the

5. 33 U.S.C., Section 903.

Longshoremen's and Harbor Workers' Act. In order to ease the burden on a compensation claimant in making his choice of remedies, the courts carved out an exception known as the "twilight zone" doctrine by virtue of which the injured party possessed a choice of either the federal or state compensation remedy when the location of the accident could reasonably have conferred jurisdiction upon the state courts or the federal administrative agencies. However, in this case it is clear that the longshoreman involved was fatally injured while working on navigable waters, and the above statute emphatically reveals that the Longshoremen's and Harbor Workers' Act is applicable to the facts hereof.[6]

The plaintiff's argument as to the applicability of the Jones Act and the general maritime law to the death of her husband is predicated primarily upon the rationale emanating from the case of Reed v. Steamship Yaka,[7] which concluded that the section of the Longshoremen's and Harbor Workers' Act quoted above making that act the exclusive remedy of a longshoreman injured aboard a vessel in navigable waters did not preclude an action by an employee against his employer for injuries sustained aboard a vessel owned by the employer. This case involved a suit under the

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6. Stepter v. T. Smith & Son, Inc., 241 La. 465, 129 So. 2d 740 (1961); Ellis v. Travelers Ins. Co., 241 La. 433, 129 So. 2d 729 (1961).
7. 373 U. S. 410, 83 Sup. Ct. 1349 (1963).

general maritime law, predicated upon the shipowner's warranty of a seaworthy vessel.

The plaintiff argues, in effect, that the Yaka decision emasculated and rendered of no effect the exclusive remedy provision of the Longshoremen's and Harbor Workers' Act. Thus counsel for plaintiff reasons that since this section is no longer in force, a person injured as a longshoreman employed by a shipowner may pursue his remedy under the Jones Act.

Our analysis of the Yaka case, however, does not support the plaintiff's contention. It is authority only for the proposition that an injured longshoreman may bring an admiralty libel under the general maritime law for injuries sustained by him aboard his employer's vessel. It does not afford a longshoreman Jones Act coverage.[8]

Finally, the plaintiff insists that she has a right to proceed against the defendant under the general maritime law. The general maritime law does not, as a rule, provide a cause of action for wrongful death.[9] However, in certain cases the Admiralty Court will look to the wrongful death statute of the state in which

8. See Aycock v. Lykes Brothers Steamship Co., Inc., 236 F. Supp. 360 (D. C. Tex. 1964).

9. Cortes v. Baltimore Insular Line, Inc. 287 U.S. 367 (1932).

it sits and apply that statute to the facts posed by the particular case.

In any event, the plaintiff contends that the rationale emanating from the case of Reed v. Yaka[10] affords a remedy directly, or in personam, against the defendant for the death of her husband. In response to this argument, the defendant points to Robinson v. Lykes Brothers Steamship Co., Inc.,[11] wherein this court concluded that the exclusive remedy provision of the Longshoremen's and Harbor Workers' Act precludes an in personam action against the employer. In that case this court construed the Yaka decision as permitting merely an in rem action against the vessel owned by the employer. Counsel for the defendant asserts that such an interpretation preserves the integrity of the Longshoremen's and Harbor Workers' Act remedy and also lends the proper effect to the ratio of the Yaka case.

An analysis of the Yaka case reveals language[12] which suggests that an in personam

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10. Supra.
11. 170 So. 2d 243 (1964).
12. "We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury."

remedy may be available; the analysis likewise reveals that there exists reason for believing that the section of the Longshoremen's and Harbor Workers' Act referred to hereinabove has been taken upon the judicial anvil and hammered into an unexpected shape.

In any event, we are of the opinion that it exemplifies more judicial integrity to conclude that the rationale emanating from Yaka merely permits a longshoreman to bring an action in rem against his employer in the federal court.

For the foregoing reasons, the judgment of the lower court is affirmed.

The plaintiff is to pay all costs of this proceeding.

AFFIRMED

APPENDIX (D)

CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS

STATE OF LOUISIANA

HELEN JACKSON NO. 431-099

VS. DIVISION "H"

LYKES BROS. STEAMSHIP CO., INC. DOCKET 4

JUDGMENT

The exceptions herein filed on July 8, 1965, by Lykes Bros. Steamship Co., Inc., came on this day for hearing.

PRESENT: CHARLES R. MALONEY,
Attorney for plaintiff.
G. EDWARD MERRITT,
Attorney for exceptor.

When, after hearing the pleadings, and argument of counsel, and for the reasons orally assigned;

IT IS ORDERED that the exceptions of no right or cause of action; jurisdiction; and that plaintiff is not the proper party to bring the action, and has no right or cause of action, be and the same are hereby maintained, and plaintiff's suit be dismissed, at plaintiff's costs.

JUDGMENT READ, RENDERED AND SIGNED IN OPEN COURT ON OCTOBER 1st, 1965.

/s/ Oliver P. Carriere
JUDGE

APPENDIX (E)

LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

33 USC, 902

SECTION 2. When used in this Act --

...

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

...

33 USC, 903

SECTION 3(a). Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of --

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

...

33 USC, 905

SECTION 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, dependents, parents, next of kin and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . .

APPENDIX (F)

JONES ACT

46 USC, 688 - Section 4

SECTION 688. Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the

case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, Section 20, 38 Stat. 1185; June 5, 1920, c. 250, Section 33, 41 Stat. 1007.

APPENDIX (G)

ARTICLE 2082 - LOUISIANA CODE OF CIVIL PROCEDURE

ARTICLE 2082

DEFINITION OF APPEAL - Appeal is the exercise of the right of a party to have a judgment of a trial court revised, modified, set aside, or reversed by an appellate court.

LIBRARY
SUPREME COURT, U. S.

Supreme Court of the United States

Office-Supreme Court, U.S.
FILED
OCT 18 1966
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1966.

No. 575

HELEN JACKSON,
Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

BENJAMIN W. YANCEY,
WILLIAM E. WRIGHT,
G. EDWARD MERRITT,
Attorneys for Respondent, Lykes Bros. Steamship Co., Inc.

TERRIBERRY, RAULT, CARROLL, YANCEY & FARRELL,
Of Counsel,
2141 International Trade Mart Building,
2 Canal Street,
New Orleans, Louisiana 70130.

LIST OF AUTHORITIES.

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Cases:

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Swanson v. Marra Bros., Inc., 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946) 2

Tungus, The v. Skovgaard, 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959) 4

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U.S.C., Title 33, Sections 901 et seq., The Longshoremen's and Harbor Workers' Compensation Act 1

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No.

HELEN JACKSON,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

MAY IT PLEASE THE COURT:

The brief of petitioner fails to set forth accurately the issues and is misleading in its statement of the holding of the lower courts. This action was instituted in personam—and in personam only—in the Louisiana state courts, by a Louisiana resident, for the allegedly wrongful death of a longshoreman, also a Louisiana resident, employed by respondent, a Louisiana corporation, to work aboard respondent's vessel at New Orleans, Louisiana.

Petitioner sought recovery for the death under (1) the Jones Act (46 U.S.C. § 688); (2) the Louisiana Workmen's Compensation Act (L.R.S. 23:1021 et seq.); (3) The Longshoremen's and Harbor Workers' Compensation Act (33

U.S.C. § 901 et seq., hereinafter referred to as the "Longshoremen's Act"); (4) miscellaneous articles of the Louisiana Civil Code; and (5) the general maritime law.

The trial court correctly dismissed the action, holding that petitioner's only cause of action is under the Longshoremen's Act over which the state court has no jurisdiction. The Louisiana Court of Appeals affirmed the dismissal and the Louisiana Supreme Court denied writs of certiorari and review.

(1) THE JONES ACT.

The Jones Act does not provide a cause of action for the death of a longshoreman. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 60 S. Ct. 544, 84 L. Ed. 732 (1940); *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 66 S. Ct. 869, 90 L. Ed. 1045 (1946). As this Honorable Court stated in denying Jones Act recovery to a longshoreman in *South Chicago Coal & Dock Co. v. Bassett, supra*, at 309 U.S. 256:

> "The legislative history of the exception now before us throws light upon the intent of Congress. For those employees who are entitled to compensation, the remedy under the (Longshoremen's) Act is exclusive. §5. This made inapplicable to such employees the provision of §33 of the Merchants Marine Act (called the Jones Act) which carried to 'seamen' at their election the benefit of the provisions of the Federal Employers' Liability Act." (First parenthesis added)

(2) LOUISIANA WORKMEN'S COMPENSATION ACT.

Since the decedent was working aboard a vessel in navigable waters at the time in question, the Louisiana Workmen's Compensation Act cannot provide a remedy. *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 (1917); *Pennsylvania Railroad Company v. O'Rourke*, 344 U.S. 334, 73 S. Ct. 302, 97 L. Ed. 367 (1953).

(3) LONGSHOREMEN'S ACT.

Although the Longshoremen's Act is admittedly the proper remedy for petitioner, jurisdiction over the Longshoremen's Act is vested exclusively in a federal administrative agency, and for judicial review in the federal courts to the exclusion of the state courts. 33 U.S.C. § 919, 921.

(4) LOUISIANA CIVIL CODE ARTICLES.

Since the death allegedly resulted from service aboard a vessel in navigable waters, the Longshoremen's Act is clearly applicable to the exclusion of state law, 33 U.S.C. § 905. The act by its own terms is the exclusive remedy as it recites:

> "The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependants, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . ."

(5) GENERAL MARITIME LAW.

The general maritime law does not, nor has it ever, provided a cause of action for wrongful death. *The Harrisburg*, 119 U.S. 199, 7 S. Ct. 140, 30 L. Ed. 358 (1886); *Cortez v. Baltimore Insular Line, Inc.* 287 U.S. 367, 53 S. Ct. 173, 77 L. Ed. 368 (1932); *The Tungus v. Skovgaard*, 358 U.S. 588, 79 S. Ct. 503, 3 L. Ed. 2d 524 (1959).

Petitioner's invocation of *Reed v. Steamship YAKA*, 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448 (1963), is misplaced inasmuch as petitioner was not here proceeding *in rem* in a personal injury action but sought recovery in the state court *in personam* for wrongful death.

CONCLUSION.

Accordingly, it is respectfully submitted that appellant's exclusive remedy is provided by the Longshoremen's Act over which the state courts have no jurisdiction; and thus the writ should be denied.

Respectfully submitted,

.....
BENJAMIN W. YANCEY,

.....
WILLIAM E. WRIGHT,

.....
G. EDWARD MERRITT.

TERRIBERRY, RAULT, CARROLL,
YANCEY & FARRELL,
Of Counsel,
2141 International Trade Mart Building,
2 Canal Street,
New Orleans, Louisiana 70130.

CERTIFICATE OF SERVICE.

I, William E. Wright, a member of the bar of this Court, do hereby certify that copies of the foregoing brief have been served upon petitioner by mailing same to petitioner's counsel of record, Charles R. Maloney, Esquire, 816 Richards Building, New Orleans, Louisiana 70112, first class mail, postage prepaid, at New Orleans, Louisiana, on this .... day of October, 1966.

.....

WILLIAM E. WRIGHT.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1966

NUMBER 575

HELEN JACKSON

VS.

LYKES BROS. STEAMSHIP CO., INC.

ON A WRIT OF CERTIORARI TO REVIEW
THE DECISION OF THE SUPREME COURT
OF LOUISIANA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

On January 5, 1965, the widow of the decedent filed suit in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking remedy under the Jones Act (46 U.S.C. 688) or in the alternative pursuant to General Maritime Law, praying for a trial by jury. (R-1) In response, the shipowner filed exceptions of no cause of action and no right of action alleging that the Longshoremen's and Harbor Workers' Act provided exclusive remedy, if there was any remedy, for the widow

of the decedent. (R-5) On October 1, 1965, the Civil District Court for the Parish of Orleans, ignoring the holding of Reed vs. Yaka, (1963) 373 US 410, 83 S Ct 1349 and additionally, ignoring the provisions of the Jones Act, maintained the exceptions of the shipowner, dismissing the action of the petitioner. (R-9) On April 4, 1966, the Fourth Circuit Court of Appeal for the State of Louisiana affirmed the decision of the lower court, alleging that the petitioner only had an in rem remedy in a non state forum and had no in personam remedy against the shipowner in any forum. (R-10) On May 2, 1966, an application for a rehearing was refused by the Fourth Circuit Court of Appeals for the State of Louisiana. And on June 21, 1966, the Supreme Court of Louisiana denied an application for a writ of certiorari, finding no error of law in the prior judgment. (R-36)

JURISDICTION

The judgment of the Supreme Court of Louisiana denying a writ of certiorari, or writ of review, to the Court of Appeal, Fourth Circuit of the State of Louisiana, was denied on June 21, 1966, printed in Appendix A of the Petition for a Writ of Certiorari. The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3). Certiorari was granted on December 5, 1966, ___ S CT ___.

STATUTES INVOLVED

(1) Sections (33 U.S.C. 902, 903 and

905) of the Longshoremen's and Harbor Workers' Compensation Act.

(2) The Jones Act (46 U. S. C. 688).

(3) The Seventh Amendment of the United States Constitution.

(4) The Warranty of Seaworthiness pursuant to General Maritime Law.

QUESTIONS PRESENTED

(1) Is the right of trial by jury guaranteed by the Jones Act (46 U. S. C. 688) and the Seventh Amendment of the United States Constitution waived in a State Court forum?

(2) Is the holding of Reed v. Yaka (1963) 373 US 410, 83 S CT 1349 applicable to a State Court forum as well as a Federal Court forum?

(3) Can there be in rem liability of a vessel to a seaman/longshoreman when there is no in personam liability of the shipowner/operator of the vessel, for the breach of the warranty of seaworthiness?

STATEMENT

While employed by the shipowner/operator, Lykes Bros. Steamship Co., Inc., as a longshoreman, the decedent, Luther Jackson, was subjected to fumes and vapors of an insecticide that escaped in the hold of a

Lykes owned and operated vessel. The inhalation of the fumes/vapors caused and/or contributed to the death of the longshoreman.

In the instant cause, the decedent, the petitioner and Lykes Bros. Steamship Co., Inc., are all citizens of the State of Louisiana. The principal office of Lykes Bros. Steamship Co., Inc., is at New Orleans, Louisiana. Vessels owned by this shipowner regularly dock, load and unload at New Orleans, Louisiana. Longshoremen, like the decedent, regularly work for the same Lykes Bros. Steamship Co., Inc.

In the instant case, Lykes Bros. Steamship Co., Inc. acted simultaneously as shipowner, ship operator and stevedore.

SUMMARY OF ARGUMENT

(1) The decedent was a seaman within the meaning of the Jones Act (46 U.S.C. 688) or at least pursuant to Reed v. Yaka (1963) 373 US 410, 83 S CT 1349.

(2) Whether or not the decedent's employment came within the scope of the Longshoremen's Act was/is a matter for the U. S. Deputy Commissioner to determine.

(3) A State Court forum, like a Federal Court forum, has no authority to make a prior determination (prior to submission of evidence) as to whether or not a particular employee is or is not

Steamship Co., Inc. is primarily a shipowner and ship operator.

With reference to the employment of the decedent, Luther Jackson, the question arises: Where did the shipowner cease to be a ship operator and where did it commence to be a stevedore? Had not a Summary Judgment been granted and had evidence been submitted at a trial of the merits the petitioner would have urged the jury to decide that at all times the shipowner acted as a ship operator, in line with its principal purpose, and not as a stevedore, with reference to its employment of the decedent.

In prior briefs the respondent, Lykes Bros. Steamship Co., Inc., has relied heavily on the case of South Chicago Coal & Dock Co. v. Bassett (1940) 309 US 251, 60 S Ct 544 as authority that Luther Jackson, could not be a member of the crew. However, petitioner urges that in the "Bassett" case the Supreme Court specifically recognized that whether or not an employee was or was not a member of the crew turned on a question of fact. In this "Bassett" case there had been a finding of fact by the U. S. Deputy Commissioner. In the instant case of Luther Jackson there has been no finding of fact by either the U. S. Deputy Commissioner or the jury. In spite of a summary judgment against the petitioner it is purely moot as to whether or not the decedent was or was not a member of the crew.

Notwithstanding that the petitioner

waters, when he was overcome by noxious fumes and/or oxygen deficient air. (R-1) Thus the decedent was at least a Sieracki type seaman. See Seas Shipping Co. v. Sieracki (1946) 328 US 85, 66 S CT 872. Also see International Stevedore Co. v. Haverty (1926) 272 US 50, 47 S Ct 19. In addition to the employee/employer relationship of the decedent, to Lykes Bros. Steamship Co., Inc., this same shipowner acted simultaneously as the operator and stevedore of the vessel to which the decedent was assigned to work. (R-1) Thus, the decedent meets the test of being a Yaka type seaman. See Reed v. Yaka, supra. Lykes Bros. employed the decedent direct. There was no intermediate, shoreside independent stevedore, as in Swanson v. Marra Bros., Inc., (1946) 328 US 1, 66 S Ct 869. Comparing Swanson v. Marra Bros., Inc., supra, to the instant case there are these distinguishing features:

(a) Marra Bros., Inc. was not a ship operator or shipowner;

(b) Swanson's accident took place on the pier, not aboard a vessel;

(c) Swanson sought and received compensation pursuant to the State compensation act; while in the instant case state compensation benefits were denied;

(d) Marra Bros. Inc. were primarily stevedores, while Lykes Bros.

Steamship Co., Inc. is primarily a shipowner and ship operator.

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Notwithstanding that the petitioner

urges that her decedent husband was a member of the crew, entitling her to seek remedy pursuant to the Jones Act, she has an alternative plea that at least her husband was a vicarious seaman, of the Yaka type, entitling her to seek remedy against the shipowner for the breach of warranty of seaworthiness. See Reed v. Yaka, (1963) 373 US 410, 83 S Ct 1349; Biggs v. Norfolk Dredging Company, 360 F 2d 360 (4 CA, 1966); Pacific Inland Navigation Company v. Course, Appeal No. 21,080, decided October 26, 1966, U. S. Court of Appeals for 9th Circuit, ____F 2d____.

2.

WHETHER OR NOT THE DECEDENT'S EMPLOYMENT CAME WITHIN THE SCOPE OF THE LONGSHOREMEN'S ACT WAS/IS A MATTER FOR THE U. S. DEPUTY COMMISSIONER TO DETERMINE.

Unlike the harbor worker in Desper v. Starved Rock Ferry Company, (1952) 342 US 187, 72 S Ct 216, the employment status of Luther Jackson, coming within the provisions of the federal act, has never been determined. No formal claim has ever been presented to the U. S. Deputy Commissioner. Accordingly, there is no presumption that the claim of the petitioner comes within the provisions of this federal act. (33 USC 920) Moreover, it is within the exclusive province of the U. S. Deputy Commissioner to make a determination as to whether or not the claim

of the petitioner comes within the provisions of this federal act. (33 USC 919) And only after such an agency determination has been made, and then only in the course of an appellate review can a United States Federal District Court review that prior determination of the U. S. Deputy Commissioner. (33 USC 921) Since no claim has been presented to the U. S. Deputy Commissioner and since the U: S. Deputy Commissioner has not made a determination as to the employment status of the decedent, the State Court forums below, as herein complained, were without any judicial authority to determine, or ascertain that the employment of the decedent came within the scope of the federal act. Whether or not the decedent was an employee within the meaning of the federal compensation act is a determination solely to be made by the U. S. Deputy Commissioner. Since the U. S. Deputy Commissioner has made no prior determination that issue is moot.. See Desper v. Starved Rock Ferry Company, supra. In the absence of any determination by the U. S. Deputy Commissioner for the Department of Labor to the effect that the employment of Luther Jackson came within the scope of the federal act the State District and Appellate forums were in error to substitute their own determination that the decedent's employment came within the exclusive scope of that federal act.

A STATE COURT FORUM, LIKE A FEDERAL COURT FORUM, HAS NO AUTHORITY TO MAKE A PRIOR DETERMINATION (PRIOR TO SUBMISSION OF EVIDENCE) AS TO WHETHER OR NOT A PARTICULAR EMPLOYEE IS OR IS NOT A MEMBER OF THE CREW.

The Court below ignored the law as persistently stated by the United States Supreme Court to the effect that whether or not an employee is a member of the crew, entitled to remedy under the Jones Act, is a question of fact to be tried by the jury. Had the U. S. Deputy Commissioner made a determination to the effect that the employment of the decedent was within the scope of the federal compensation act, then this would have represented a conclusive presumption. See Desper v. Starved Rock Ferry Company, (1952) 342 US 187, 72 S Ct. 216. And when a case is to be tried by a jury, as the instant case, it is a question of fact for the jury to determine. The determination of whether the decedent was a seaman should not be taken from the jury by the trial judge if there is any evidentiary basis for the jury to determine. Grimes v. Raymond Concrete Pile Company, (1957) 356 US 252, 78 S Ct. 687. Gianfala v. Texas Co., 350 US 879 (1955); Senko v. LaCrosse Dredging Corp., 352 US 370 (1957) rehearing denied, 353 US 931 (1957); Braniff v. Jackson Ave. Gretna Ferry, Inc., 280 F 2d 523, (CA 5th, 1960); Offshore Company v. Robinson, 266 F 2d 769 (CA 5th, 1959); Butler v. Whiteman, (1957)

356 US 271, 78 S Ct. 734; McKie v. Diamond Marine Co., 204 F 2d 132 (CA 5th 1953).

WHETHER OR NOT THE DECEDENT WAS A MEMBER OF THE CREW, ENTITLING HIS WIDOW TO REMEDY PURSUANT TO THE JONES ACT, HE WAS, NEVERTHELESS A SEAMAN, PURSUANT TO REED V. YAKA, SUPRA, ENTITLING HIS WIDOW TO REMEDY PURSUANT TO GENERAL MARITIME LAW, AS SUPPLEMENTED BY THE LOUISIANA WRONGFUL DEATH STATUTE (LSA-CC 2315)

Whether or not the decedent was a member of the crew, he was at the very least, a Yaka type seaman. Pursuant to Reed v. Yaka, supra, as supplemented and enabled by the Louisiana Wrongful Death Statute (LSA-CC 2315) give the petitioner a right of action and cause of action to seek remedy for the death of her husband. The applicable parts of LSA-CC 2315 read as follows:

> "Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
>
> "The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs,

subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; . . . The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. . ."

The petitioner submits that the Jones Act, 46 USC 688, as supplemented by the Federal Employee's Liability Act (FELA), 45 USC 51-59, affords the petitioner a right of action for the death of her husband. Assuming that the petitioner is denied a right of action under the Jones Act, she still has a right of action under General Maritime Law, enabled by the Louisiana Civil Code Article, 2315. See Tungus v. Skovgaard, (1959) 358 US 588, 79 S Ct 503; also see United N. Y. and N. J. Sandy Hook Pilots Assn. v. Halecki, (1959) 358 US 613, 79 S Ct 517; Hess v. United States, (1960) 361 US 314, 80 S Ct 341, and Goett v. Union Carbide Corp., (1960) 361 US 340, 80 S Ct 357.

THE INJURIES SUSTAINED BY THE DECEDENT DOES NOT PRESENT AN ISSUE COMING WITHIN THE SCOPE OF THE "TWILIGHT DOCTRINE"

In deciding the instant case, as well as Robinson v. Lykes Bros. Steamship Co., Inc., 170 So 2d 243 (La App 1964); cert. den. (1965) 247 La 481, 172 So 2d 292, the district, appellate and highest court of Louisiana relied heavily on the decision in Stepter v T. Smith & Son, Inc., (1961) 241 La 465, 129 So 2d 740 and Ellis v. Travelers Ins. Co., (1961) 241 La. 433, 129 So 2d 729, both of which involved longshoremen suing non shipowner employers for benefits under the Louisiana Workmen's Compensation Act. However, the issues as presented in Ellis and Stepter are grossly distinguishable in the following:

(a) Ellis and Stepter were longshoremen suing stevedore employers, then for state compensation benefits;

(b) No owner or operator of a vessel was involved in the suit;

(c) No issue of the warranty of seaworthiness or the Jones Act was involved in the remedy sought by Ellis and Stepter;

(d) The claims for state compensation benefits by Ellis and Stepter come subsequent to a federal award and subsequent to payment of federal benefits.

It is submitted that the aforementioned Stepter and Ellis cases have a rightful place in the history of the "twilight doctrine" with such cases as Southern Pacific Co. v. Jensen, (1917) 244 US 205, 37 S Ct 524 and Davis v. Department of Labor, (1942) 317 US 249, 63 S Ct 225, but have no bearing on the instant case with reference to the petitioner. Parenthetically, if these courts were to decide the instant case by reference to those cases coming within the scope of what is known as the "twilight zone," then it is submitted that the courts of the State of Louisiana should have, at least, referred to Calbeck v. Travelers Ins. Co., (1962) 370 US 114, 82 S Ct 1196. Perhaps the holding of "Calbeck" does not apply properly herein, in the same manner that "Jensen" and "Davis" do not apply, but it is submitted, that at least the spirit of "Calbeck" should apply to help understand that Longshoremen's and Harbor Workers' Compensation Act of 1927 was enacted to enlarge and/or ensure remedy for maritime employees, and not to restrict them. And, of course, this same spirit of enlargement, not restriction, pervades in Reed v. Yaka, (1963) 373 US 410, 83 S Ct 1349.

It is submitted by the petitioner there is nothing in Stepter, Ellis, Jensen, or Davis

that would serve as authority to restrict or inhibit the rights of the petitioner to seek remedy under Jones Act and/or under General Maritime Law, pursuant to Reed v. Yaka, supra.

6.

THE HOLDING OF REED V. YAKA, SUPRA, APPLIES EQUALLY TO A STATE COURT FORUM AS WELL AS A FEDERAL COURT FORUM.

In deciding the instant case against Helen Jackson, the Court of Appeals, Fourth Circuit for the State of Louisiana, assumed that the answer to all questions posed by the petitioner was found in the exclusive clause of the Longshoremen's and Harbor Workers' Compensation Act (33 USC 905). See R-11, bottom, continued R-12. Then similar to its opinion in Robinson v. Lykes Bros. Steamship Co., Inc., 170 So 2d 243 (La App 1964) cert. den. La S Ct (1965), the same appellate court reasoned that the petitioner, herein, was not afforded any in personam right of action against the shipowner:

> "An analysis of the Yaka case reveals language which suggests that an in personam remedy may be available; the analysis likewise reveals that there exists reason believing that the section of the Longshoremen's and Harbor Workers' Act referred to herein-

above has been taken upon the judicial anvil and hammered into an unexpected shape." (R-14)

Yet, in spite of Reed v. Yaka, supra, the court denied the petitioner remedy, and further concluded:

> "In any event, we are of the opinion it exemplifies more judicial integrity to conclude that the rationale emanating from Yaka merely permits a longshoreman to bring action in rem against his employer in federal court." (R-14/15)

In arriving at decisions in both Robinson and the instant case the appellate court of Louisiana took a narrow and restrictive view of 33 USC 905, contrary and in spite of Reed v. Yaka, supra.

Lykes Bros. Steamship Co., Inc., acting simultaneously as a ship operator and stevedore, is typically represented in Reed v. Yaka, supra, and for the Louisiana courts to hold that the petitioner had no in personam remedy against this shipowner, in effect, emasculated the entire spirit of Reed v. Yaka. Thus, if the holdings in Robinson and Jackson by the Louisiana courts are correct, then the case of Reed v. Yaka must be rewritten so as to hold:

(a) the obligation of maintaining

a seaworthy vessel is delegable;

(b) the shipowner can shift its obligation by selective use of contracts;

(c) only blind adherence to the superficial or literal meaning of a statute (i.e., 33 USC 905) will satisfy the law;

(d) the humanitarian policy of the doctrine of seaworthiness is a sometimes doctrine;

(e) the obligation of seaworthiness can be limited, evaded and/or escaped by choosing the proper type of employment contracts;

(f) or, in the alternative, if any of the foregoing are not true in federal courts, then they are always true in state courts.

Of course, in Reed v. Yaka it has been explicitedly stated, the prior existence or prior availability of payment of compensation to a maritime worker did not bar his right to seek his traditional maritime rights.

"The only question," said the Court,

"is whether the Longshoremen's Act prevents recovery by petitioner for Pan-Atlantic's (the charterer's) breach of its warranty of seaworthiness." 373 US at 413, 83 S Ct 1352.

Further, 373 US at 413, 83 S Ct 1352:

"In Seas Shipping Co. v. Sieracki, 328 US 85, we held that a shipowner's warranty of seaworthiness extended to a longshoreman injured while loading the ship, even though the longshoreman was employed by an independent contractor. In doing so, we noted particularly the hazards of marine service, the helplessness of the men to ward off the perils of unseaworthiness, the harshness of forcing them to shoulder their losses alone, and the broad range of the 'humanitarian policy' of the doctrine of seaworthiness, which we held not to depend upon any kind of contract. 328 US at 93-95. We further held that the Longshoremen's and Harbor Workers' Act was not intended to take away from Longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation."

Again, 373 US at 415, 83 S Ct 1354:

"In the light of this whole body of

law, statutory and decisional, only blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional, absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid."

The petitioner urges her decedent husband should have the status of Sieracki and Yaka with reference to the nondelegable obligation of seaworthiness which Lykes Bros. Steamship Company, Inc. should not be permitted to avoid. See Biggs v. Norfolk Dredging Company, 360 F 2d 360 (CA 4th, 1966); Pacific Inland Navigation Company v. Course, Appeal No. 21,080, decided October 26, 1966, U. S. Court of Appeals for 9th Circuit, F 2d.

7.

THERE CAN BE NO IN REM LIABILITY OF A VESSEL UNLESS THERE IS CORRESPONDING IN PERSONAM LIABILITY OF THE SHIPOWNER/OPERATOR.

To effect a dismissal of the petitioner's cause the defendant shipowner has had to urge the priority of an in rem action over in personam.

This is humorous. A shipowner stands to lose $5,000.00 for each day a vessel is under seizure, yet the shipowner, herein, is in effect urging litigants to seize vessels in order to litigate. Thus, caught in the web of its own defense, the shipowner is advocating a legal fiction it most abhors.

Parenthetically, the petitioner would urge there can be no in rem liability unless there is corresponding or underlying personal liability. Liability grows out of the use, operation and/or ownership of a thing, but the thing cannot use, operate or own itself, or another thing. See City of Norwich (1885) 118 US 468, 6 S Ct 1150; Continental Grain Co. v. Barge FBL-585 (1959) 364 US 19, 80 S Ct 1470. In Continental Grain Co. v. Barge FBL-585, 364 US 23, the court said:

> "...A purpose of the fiction among others, has been to allow action against ships where a person owning the ship could not be reached, and it can be very useful for this purpose still...A fiction born to provide a convenient forum should be transferred into a weapon to defeat that very purpose."

And in the City of Norwich, 118 US 503 the Court said:

> "...To say that an owner is not liable, but that his vessel is liable, seems to us like talking

in riddles. A man's liability for a demand against him is measured by the amount of property that may be taken from him to satisfy that demand. In the matter of liability a man and his property cannot be separated."

However, the petitioner urges the question of whether or not a vessel, itself, may be solely liable is not an issue before this Court. If the exclusive clause (33 US 905) is not to be narrowly and restrictively interpreted, then there is personal liability for the employer of the longshoreman as the Court stated in Reed v. Yaka, 373 US 412:

"We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view the Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthiness of the ship which caused petitioner's injury."

Jackson's employee/employer relationship to Lykes was all and more than Reed's relationship to Pan-Atlantic. And while Pan-Atlantic's relationship to the vessel was that only of a demisee Lykes is that of an owner and operator.

It is submitted by the petitioner that if

Pan-Atlantic (in Yaka) was personally liable as a demisee and non owner, then Lykes Bros. has to be personally liable as both owner and operator of the vessel.

CONCLUSION

In conclusion the petitioner urges and prays that the United States Supreme Court will remand this matter to the Supreme Court of Louisiana with instructions for the Supreme Court of Louisiana to direct the Civil District Court for the Parish of Orleans to reverse its judgment dismissing the petitioner's suit for no right of action and no cause of action and to order the Civil District Court for the Parish of Orleans to allow this case to be tried on the merits and the petitioner prays for such other relief as the nature of the case and equity shall require.

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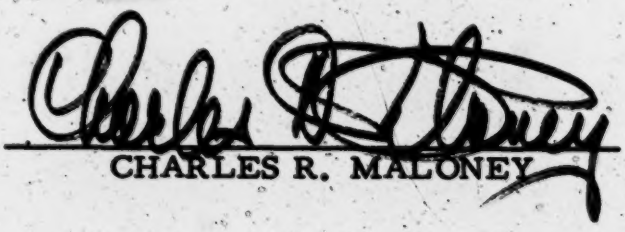
PROOF OF SERVICE

I, CHARLES R. MALONEY, attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I have served copies of the foregoing Brief on Mr. G. Edward Merritt, of Messrs. Terriberry, Rault, Carroll, Yancey & Farrell, by mailing a copy thereof, postage prepaid, addressed to their office at 2141 International Trade Mart Building, 2 Canal Street, New Orleans, Louisiana 70130.

Dated this 11 day of February, 1967.



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Supreme Court of the United States

OCTOBER TERM, 1966.

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No. 575

HELEN JACKSON,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF OF RESPONDENT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

No. 575.

HELEN JACKSON,

Petitioner,

versus

LYKES BROS. STEAMSHIP CO., INC.,

Respondent.

On Writ of Certiorari to the Supreme Court of Louisiana.

BRIEF OF RESPONDENT.

OPINIONS BELOW.

The opinion of the Civil District Court for the Parish of Orleans, State of Louisiana, which sustained respondent's exceptions of no right or cause of action and to the jurisdiction of the court, is unreported but appears at R. 9.

The opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, affirming the District Court, is reported at 185 So. 2d 342, as is the denial of a rehearing by the Court of Appeal. The denial by the Supreme Court of Louisiana of petitioner's application for a writ of certiorari is reported at 249 La. 460, 187 So. 2d 441.

STATUTES INVOLVED.

1. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Secs. 901 et seq., particularly Secs. 903, 905, and 933.

2. Jones Act, 46 U.S.C. Sec. 688.

3. Louisiana Workmen's Compensation Act, Louisiana Revised Statutes Title 23, Sec. 1021 et seq.

4. Louisiana Revised Civil Code, Article 2315.

QUESTIONS PRESENTED.

1. May an action for damages be maintained, in direct contravention of the plain and unequivocal exclusive liability provision of the Longshoremen's Act, directly against the employer of a longshoreman, with no third party involved, for death allegedly arising out of his employment, on navigable waters aboard a vessel owned by his employer?

2. May one who is not the duly qualified administrator of the decedent's estate and who, thus, is not decedent's "personal representative", maintain an action under the Jones Act for the death of a longshoreman alleged to be a "seaman"?

STATEMENT OF THE CASE.

This was an action instituted in the Louisiana State Court for the death of a longshoreman who allegedly inhaled noxious fumes during the course of his employment by respondent, on navigable waters, aboard a vessel owned by respondent. It is alleged that respondent was negligent in certain specified particulars. It is specifically alleged that decedent was a longshoreman, "engaged in cargo operations".[1]

No third party is involved.

The original petition sought recovery under the Jones Act, the general maritime law, certain articles of the Louisiana Civil Code, particularly the state "Death Statute", Article 2315, the Longshoremen's Act, and the Louisiana Workmen's Compensation Act.[2]

In the trial court, defendant below filed the following exceptions:

1. As to the Jones Act claim, plaintiff had no right of action, inasmuch as the Jones Act gives a right of recovery to the "personal representative" of decedent, and plaintiff was not a qualified and appointed administratrix; secondly, that plaintiff had no cause of action under the Jones Act which, under the settled jurisprudence, does not apply to longshoremen;

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[1] R. 1.
[2] R. 1-5.

2. Since the Longshoremen's Act was clearly applicable, there was no cause or right of action under the state compensation act, or under state law;

3. The general maritime law does not provide a remedy for wrongful death, and in view of the exclusive provisions of the Longshoremen's Act, there can be no recovery under the general maritime law.

The trial court sustained all the exceptions and dismissed the suit. The state Court of Appeal affirmed, and the Louisiana Supreme Court denied a writ of certiorari.

SUMMARY OF ARGUMENT.

1. The Longshoremen's Act is exclusive and in place of all other liability of respondent to petitioner.

2. This is not a *Yaka*[3] case. It is a personal action for death, and no third party or third party's vessel is involved.

3. To maintain the right to damages in this case would require repeal of Section 5 of the Longshoremen's Act; would undermine the constitutional basis of that act; and is not justified by *Yaka*.

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[3] *Reed v. Steamship Yaka*, 373 U.S. 410.

4. Petitioner is not the duly qualified administratrix of decedent's estate, is not the "personal representative" of decedent, and may not maintain an action under the Jones Act; further, the act is, as a matter of law, not applicable to longshoremen.

ARGUMENT.

I.

The Longshoremen's Act Is Exclusive And In Place Of All Other Liability Of Respondent To Petitioner.

The death of petitioner's decedent allegedly resulted from his employment by respondent as a longshoreman on a vessel upon the navigable waters of the United States. Recovery for his death could not constitutionally be provided by state law.[4]

It is clear that the Longshoremen's Act applies, and that it furnishes the sole remedy here.[5]

Section 5 of the act provides:[6]

"§905. Exclusiveness of liability

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to

[4] *Southern Pacific Co. v. Jensen*, 244 U.S. 205; *Pennsylvania Railroad Co. v. O'Rourke*, 344 U.S. 334; *Ellis v. Travelers Ins. Co.*, 241 La. 433, 129 So. 2d 729.

[5] 33 U.S.C. §903 (See Appendix).

[6] 33 U.S.C. §905 (See Appendix).

the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

No better discussion of the purposes and effect of the exclusive feature of the act can be found than that set out in the views of the minority in *Ryan*.[7] As there stated, the act was "revolutionary" in its field. It took away from the longshoremen the right to sue their employers for negligence, and substituted a fixed schedule of compensation regardless of fault. Many workers and employers opposed the compensation scheme. Congress weighed the conflicting interests of the employers and employees, and struck what was considered to be a "fair and constitutional" balance. Injured employees lost their chance to get large tort verdicts against their employers, but gained the right to get a sure though frequently more modest recovery. As to employers, it was there said:[8]

> "And while Congress imposed absolute liability on employers, they were also accorded counterbalancing advantages. They were no longer to be subjected to the hazards of large tort verdicts. Under no circumstances were they to be held liable to their own employees for more than the compensation clearly fixed in the Act."

[7] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, 350 U.S. 124.

[8] *Ibid*, 350 U.S. at 140.

The whole predicate of the act, and of its constitutionality, was its substitution of the benefits of the act for all the liabilities of the employer to the employee; a predicate made specific and expressed in Section 5, *supra*. This exclusiveness is a common feature of compensation schemes generally,[9] and is similarly a feature of the government's own compensation plans.[10] As recently as December 1966, this Court, in a very interesting and illuminating opinion,[11] emphasized the exclusiveness of a government compensation act,[12] and found the exclusiveness to be implied where Congress, unlike the situation in our act, had not in fact expressed it.

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[9] Larson, "The Law of Workmen's Compensation", Matthew Bender & Co., Inc. (1961 Ed.) Vol. 2, p. 135.

[10] See, for example, Federal Employees' Compensation Act, 5 U.S.C. §§751 et seq., particularly §757(b); see also *Johansen v. United States*, 343 U.S. 427; *Patterson v. United States*, 359 U.S. 495.

[11] *U.S. v. Demko*, 35 U.S.L. Week 4028 (December 5, 1966). In denying the injured party the right to sue the government under the Federal Tort Claims Act, the Court said at 35 U.S.L. Week 4029:

> "Historically, workmen's compensation statutes were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and subject to common-law defenses to such suits. Thus compensation laws are practically always thought of as substitutes for, not supplements to, common-law tort actions. A series of comparatively recent cases in this Court has recognized this historic truth and ruled accordingly. [*Johansen and Patterson ibid.* Note 10] for instance, are typical of the recognition by this Court that the right of recovery granted groups of workers covered by such compensation laws is exclusive. Such rulings of this Court have established as a general rule the exclusivity of remedy under such compensation laws. . . . . Consequently we decide this case on the *Johansen* principle that, where there is a compensation act that reasonably and fairly covers a particular group of workers, it presumably is the exclusive remedy to protect that group."

[12] 18 U.S.C. §4126.

There is certainly no basis, in policy, in reason, or in justice, and there is none suggested in the cases, for treating a private employee differently from a government employee, or the government as an employer differently from a private employer, in identical circumstances. The government has waived its sovereign immunity in ordinary tort situations, and has subjected itself to the same liabilities, both at law[13] and in admiralty[14] as private parties. If the exclusiveness of the compensation act is to be maintained in the case of the government, even where not express, so must also the specific and express exclusiveness be maintained as to private parties.

There are no exceptions whatsoever to the exclusive nature of Section 5 of the Longshoremen's Act; nor the slightest basis for arguing that the employer is any the less the "employer" because he is a shipowner.

In 1959, three years after *Ryan, supra,* Congress adopted an amendment to the act[15] to liberalize procedure in injured employee's rights to recover against third parties. The committee report[16] recommending the amendment expressly reiterated the exclusive feature of Section 5:

"BACKGROUND OF THE BILL

"Like other workmen's compensation laws the Longshoremen's and Harbor Workers'

[13] Federal Tort Claims Act, 28 U.S.C. §§1346(b), 2671 et seq.
[14] Suits in Admiralty Act, 46 U.S.C. §§741-752; Public Vessels Act, 46 U.S.C. §§781-790.
[15] 33 U.S.C. §933 (See Appendix).
[16] Senate Report No. 428, 86th Congress, 1st Session, 1959 U.S. Code and Administrative News, Vol. 2, p. 2134.

> Compensation Act involves a relinquishment of certain legal rights by employees in return for a similar surrender of rights by employers. Employees are assured hospital and medical care and subsistence during convalescence. Employers are assured that regardless of fault their liability to an injured workman is limited under the act. In some instances injury to an employee is caused by a third party. In such circumstances, section 33 of the act reserves to the employee the right to seek damages against the third party.
>
> "Section 5 of the Longshoremen's Act makes the statutory liability of an employer the exclusive liability for injury to an employee arising out of employment."

This is a plain reiteration by Congress, in the full context and significance of *Ryan* (where a third party was involved and indemnity had been allowed), that, as between employer and employee, with no third party involved, Section 5 meant what it said, and still governs the direct relations of employer and employee.

This Court has consistently resisted attempts to destroy the exclusive remedy provisions of the Longshoremen's Act, insofar as it applies to the direct relations between employer and employee.[17]

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[17] *Nogueira v. New York, N.H., & H. R. Co.*, 281 U.S. 128, in which a railroad freight handler, loading freight into railroad cars on a car float on navigable waters, sought recovery under the Federal Employers' Liability Act, and this Court

It is submitted, therefore, that Congress has provided a workmen's compensation remedy to the petitioner here, and that, as against the employer, Congress has made this remedy exclusive.

II.

This Is Not A Yaka Case. It Is A Personal Action For Death, And No Third Party Or Third Party's Vessel Is Involved.

Despite petitioner's efforts to make it appear so, this is not a case arising under the holding of *Reed v. Steamship Yaka, supra.*

This is an action for damages for the death of a longshoreman. It is an ordinary tort suit, alleging negligence, and brought directly against his employer in a state court, with no third party and no third party's vessel involved.

In *Yaka* the suit was *in rem* against an independently owned vessel, whose owner impleaded her bareboat charterer, the actual operator, who had expressly indemnified the owner and held it harmless "against any claims arising out of the operation of the vessel"

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held the Longshoremen's Act to be his exclusive remedy; *South Chicago Coal & Dock Co. v. Bassett,* 309 U.S. 251, in which it was contended that because decedent performed the incidental function of handling the ship's lines his widow could sue for damages, and this Court held that "For those employees who are entitled to compensation, the remedy under the Act is exclusive. §5." See also *Norton v. Warner Co.*, 321 U.S. 565, where, at 569-570, the unanimous Court said:

> "The Senate Report makes clear that 'The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting and repairing ships' . . . The liability of an employer under the Act is exclusive. §5."

by the charterer.[18] The suit was not against the employer, and no judgment was given the employee against the employer.

Yaka was the classic third-party situation. Ours is not. Here, what is sought is damages, for negligence, directly and immediately from the employer, precisely and exactly what the act expressly forbids.

Yaka involved unseaworthiness, i.e., liability without fault. The original petition in the present case was based squarely on negligence.[19] If it should be contended, and we do not think it can fairly be contended, that the petition, notwithstanding its plain allegation of negligence and its plain allegation of failure to do specific things, is broad enough to include liability *without* fault, then it must be remembered that this is a death case. The general maritime law gave no cause of action for death, but the maritime law looks to the state law, and, in appropriate cases, enforces the state Death Statute.[20] The Louisiana courts have not passed upon the problem of whether there is a liability for unseaworthiness, i.e.,

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[18] *Reed v. SS Yaka*, 183 F. Supp. 69, 70 (EDPa).

[19] R. 1-5.

[20] See *The Harrisburg*, 119 U.S. 199; *The Hamilton (Old Dominion Steamship Co. v. Gilmore)*, 207 U.S. 398; *La Bourgogne (Deslions v. C.G.T.)*, 210 U.S. 95; *Western Fuel Co. v. Garcia*, 257 U.S. 233; *The Tungus v. Skovgaard*, 358 U.S. 588; *Goett v. Union Carbide Corp.*, 361 U.S. 340; *Hess v. United States*, 361 U.S. 314; *Continental Casualty Co. v. Benny Skou*, 200 F.2d 246 (4 Cir.); *Graham v. A. Lusi, Ltd.*, 206 F.2d 223 (5 Cir.); *Lee v. Pure Oil Co.*, 218 F.2d 711 (6 Cir.); *Klingseisen v. Costanzo Transp. Co.*, 101 F.2d 902 (3 Cir.); *H. S., Inc., No. 72*, 130 F.2d 341 (3 Cir.); *Feige v. Hurley*, 89 F.2d 575 (6 Cir.); *Curtis v. A. Garcia y Cia.*, 241 F.2d 30 (3 Cir.); *O'Brien v. Luckenbach S. S. Co.*, 293 F. 170 (2 Cir.); *Quinette v. Bisso*, 136 F. 825 (5 Cir.); *A. W. Thompson*, 39 F. 115 (D.C., S.D.N.Y.).

without fault, under its Death Statute;[21] and the jurisprudence of this court has been that that question is necessarily and properly reserved to the state courts.[22]

In all cases, including *Yaka*, heretofore considered by this Court, there was the situation of a third party, being liable to the injured person, and being given indemnity, express or implied, from the employer.[23]

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[21] Louisiana Revised Civil Code, Article 2315 (See Appendix).

[22] See *Tungus, Goett,* and *Hess,* footnote 20, *supra.* In view of the exclusive provision of Section 5 of the act, the courts below in the present case did not reach, and could not have reached, this question.

[23] In *Ryan, supra,* the injured longshoreman sued the shipowner in a state court. The shipowner removed, and filed a third-party complaint against the stevedore. The longshoreman recovered from the shipowner, and in this Court, the shipowner recovered indemnity from the stevedore on an implied warranty of workmanlike performance. In *Yaka, supra,* the injured longshoreman proceeded *in rem* against the independently owned vessel. The shipowner impleaded the bareboat (demise) charterer, who also was the stevedore/employer, and who had expressly indemnified the shipowner. As in *Ryan,* the injured longshoreman recovered from the shipowner, who in turn recouped under the express indemnity. The longshoreman, however, made no direct recovery whatsoever from the charterer/stevedore/employer.

In *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.,* 376 U.S. 315, again the suit was by the injured longshoreman against the shipowner, which, having been cast, paid the judgment and brought an independent suit for indemnity against the stevedore/employer. The only problem in this Court was whether an express warranty against negligence in the stevedoring contract negated the implied warranty of workmanlike performance.

So, too, both *Weyerhauser Steamship Co. v. Nacirema Operating Co.,* 355 U.S. 563, and *Waterman Steamship Corp. v. Dugan & McNamara,* 364 U.S. 421, by unanimous courts, involved the stevedore/employer's indemnity to the shipowner after the shipowner had been cast in favor of the injured longshoreman.

All these cases were cases of the third-party recovery contemplated by Section 33 of the Longshoremen's Act, the recovery preserved by the act where the longshoreman suffers injury by a third-party's breach of duty toward the longshoreman. In none was there any hint of liability by the employer directly to the employee.

No case in this court has involved the point of attempting to fix direct personal liability on the employer in an ordinary personal action for death based on negligence. Petitioner's position in the present case is such an attempt.

This case is wholly dissimilar from *Yaka*, involves no third party or third party's vessel, and is not controlled by that decision. This is a direct action at law by the employee's widow against the employer for damages for alleged negligence, in plain contravention of the prohibition of Section 5, and of its provision that compensation under the act shall be exclusive and in place of "all other liability" "at law or in admiralty".

III.

Maintaining The Right To Damages In This Case Requires Repeal Of Section 5 Of The Longshoremen's Act; Would Undermine The Constitutional Basis Of That Act; And Is Not Justified By Yaka.

As has been said, what we have here is a direct suit at law seeking damages for negligence from the employer of decedent. This is specifically and expressly what is forbidden by Section 5 of the Longshoremen's Act.

The act clearly contemplates two situations: one in which, under the circumstances of the case, a third party may be liable; and the other in which only the employer is liable. In the former, the injured employ-

ee's right to sue the third party is plainly preserved and protected. In the latter, the act declares, in words which should admit neither of misunderstanding nor of interpretation, that the liability of the "employer", as provided in the act, shall be "exclusive and in place of all other liability of such employer to the employee" "at law or in admiralty."

In 1959, having before it *Sieracki* (extending to longshoremen the right to damages from third parties for unseaworthiness),[24] and *Ryan* (allowing the third party indemnity against the employer),[25] and in full appreciation of those decisions, Congress liberalized the third party procedure of Section 33, but reiterated its understanding of Section 5 as the "exclusive liability for injury to an employee arising out of the employment."[26] Congress did not then repeal Section 5, or amend it to provide that the liability of the employer should be exclusive "except when the employer is the shipowner." It left the word "employer" in Section 5 express, explicit, categorical, and unqualified; and left the direct liability of the employer expressly, explicitly, categorically, and unqualifiedly, exclusively that of the act.

Petitioner's whole position disregards Section 5 as though it were not written. That position, we submit, cannot be maintained without a Congressional repeal of the section. So far from repealing the section, Congress has expressly reaffirmed it.

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[24] *Seas Shipping Co. v. Sieracki*, 328 U.S. 85.
[25] *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.*, *supra*.
[26] See footnote 16, *supra*.

Petitioner's complete disregard of the express provisions of Section 5 destroys the whole constitutional basis of the Longshoremen's Act. In *New York Central Railroad Company v. White*,[27] this Court established the criteria for upholding the constitutionality of the workmen's compensation scheme: the workmen's compensation act deprives the employer of some rights, makes him liable without fault, and takes from him various defenses. Similarly, it takes away the right of the employee to recover full damages for an injury sustained in the course of the employment. The Court stated, however, that the very basis of the constitutionality of the act was that both employer and employee received a *quid pro quo*.[28] To the same effect, see the comments of both majority and minority in *Ryan*. To argue now that, because this employer is also the shipowner, there may be an action directly against him personally, is to take completely away from this employer that *quid pro quo* and to destroy the fundamental basis of the constitutionality of the act.

That petitioner's position destroys the constitutional basis of the act is, of course, vital. Further, however, it renders the third party provisions of Section 33 meaningless. It seeks to put the employer in precisely the same position as a third party in the exposure to liability for damages, which the act expressly forbids, and at the same time leaves the employer subject to a claim for compensation, if the employee fails to recover damages, or recovers damages in an amount

[27] 243 U.S. 188.
[28] *Ibid.*, 243 U.S. at 203-204.

less than compensation.[29] In the true third party situation, Congress intended, and specifically so provided, that if the employer pursues the third party suit, he is to be made whole for expenses, reasonable attorney's fee (fixed by the deputy commissioner), medical benefits, amounts paid as compensation, and one-fifth of the surplus, if any; the remainder to be paid to the employee.[30] If the employee pursues the third party suit, the employer remains liable for the excess of the amounts due under the act over the amount recovered from the third party.[31] If the employee settles the third party suit, the employer's interest in that suit is expressly protected by the provision which makes the employer liable for further compensation "only if such compromise is made with his written approval."[32] Petitioner's attempt here to treat the employer as though it were a third party effectively eliminates all of these provisions: the employer, of course, cannot sue itself, and these mutually protective provisions are rendered meaningless.

Yaka does not at all justify petitioner's position. *Yaka* was the third party situation of *Ryan*,[33] with

[29] In this case, petitioner has served a copy of the original petition on the deputy commissioner (the federal official having immediate jurisdiction of claims under the Act) "to interrupt prescription" under the Longshoremen's Act, R. 3. Assuming, *arguendo*, that this is effective as a claim under the act, it clearly evidences the intention to pursue a claim under the act dependent on the outcome of this case.

[30] 33 U.S.C. §933(b) and (e), (See Appendix).

[31] 33 U.S.C. §933(f), (See Appendix).

[32] 33 U.S.C. §933(g), (See Appendix).

[33] At the risk of undue repetition, we point out that *Yaka* was a libel *in rem* against a third-party's vessel, with the bareboat charterer/stevedore/employer impleaded under an express indemnity, 183 F. Supp. 69. There was no direct suit against the employer, and no direct judgment ever rendered against the employer, see 183 F.Supp. at 77.

the difference that in *Ryan* the Court implied a warranty whereas in *Yaka* the parties had expressed it. What the minority had objected to in *Ryan* was the majority's finding an indemnity to be implied in an ordinary stevedoring contract, and permitting the third party, liable to the injured longshoreman, to recoup from the employer, the stevedore, who, the minority felt, should have been protected from such liability by the exclusive provisions of section 5. Because there was present an express indemnity in *Yaka*,[34] what was actually decided there can certainly be said logically to follow from the views of both wings of the *Ryan* Court.

Petitioner's effort to see in *Yaka* a justification for direct suits against the employer misreads the case,[35] taking it completely out of the context of its facts. The question of direct liability of the employer to the longshoreman did not there arise, and was not there decided. We do not believe that petitioner can so lightly assume the Court's intention, in *Yaka*, to repeal Section 5, to cast grave doubt on the constitutionality of the whole act, and to upset the entire carefully drawn and plainly expressed Congressional plan

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[34] *Ibid.*

[35] Two Courts of Appeals have also misconstrued it: the Ninth Circuit, *Pacific Inland Navigation Co. v. Course*, 368 F. 2d 540 (in which the concurring judge, at 542, felt constrained to say that *Yaka* "*ex necessitate* reads §5 out of the Longshoremen's and Harbor Workers' Compensation Act") and *Grace Line, Inc. and the SS Santa Juana v. Kanton*, 366 F. 2d 510, *cert. den.* 35 U.S.L. Week 3234 (January 9, 1967); *reh. den.*, 35 U.S.L. Week 3294 (February 13, 1967) and the Second, *Scopaz v. SS Santa Luisa and Grace Line, Inc.*, January 30, 1967, unreported as of the preparation of this brief.

of the longshoreman's and employer's rights as between themselves.

That different workers in different situations may have different rights is, of course, a truism. Railroad workers have different rights from other land workers; seamen different rights from land workers; workers covered by compensation acts different rights from those not covered; longshoremen injured ashore different rights from those injured on navigable waters. The plainly expressed intent of Congress that the employer's only direct liability to the longshoreman is to be that of the act is not to be abrogated because of any desire to equalize rights among different longshoremen, differently placed.

As said by this Court in *Nogueira*:[36]

> "The fact that the same employee of a railroad company may have different rights at different times is a familiar consequence of the application of different laws, as, for example, when the employee of a railroad company is engaged at one time in intrastate commerce and at another time, even on the same day, in interstate commerce; and the application of Federal laws where the employment falls within the Federal jurisdiction is manifestly a matter within the discretion of Congress."

[36] 281 U.S. at 137-138.

Without impugning in the least the validity of *Yaka* on its facts, we submit that Section 5 of the act bars the direct liability sought to be imposed on the employer here; and that to contend otherwise is to ask this Court for the outright judicial repeal of the section, a request which should be addressed much more appropriately elsewhere. It is also to imperil the constitutionality of the act, to upset the whole congressional scheme of compensation, and to render grossly unfair and unconstitutional what has always been considered by this Court to be "a fair and constitutional balance."[37]

IV.

Petitioner Is Not The Duly Qualified Administratrix Of Decedent's Estate, Is Not The "Personal Representative" Of Decedent, And Thus Is Not The Party In Whom The Jones Act Vests The Cause Of Action. Further, The Jones Act Does Not Apply To Longshoremen.

The Jones Act,[38] which extended to seamen the cause of action for negligent injury theretofore existing in favor of railroad workers under the Federal Employers' Liability Act,[39] expressly vested the cause of action in case of death in the "personal representative" of the decedent. "Personal representative" means the duly qualified administrator or executor of

[37] Cf., the comments of Mr. Justice Black in *Ryan, supra,* 350 U.S. at 140.
[38] 46 U.S.C. §688 (See Appendix).
[39] 45 U.S.C. §§51 et seq.

the decedent's estate,[40] and the right to bring suit under the Jones Act rests only in such a duly qualified administrator or executor. It does not lie in the named beneficiaries.[41] Louisiana recognizes the distinction between "personal representative", as used in the act, and the heirs or legatees of the decedent; and in line with the federal jurisprudence, has defined the term "personal representative", as used in the act, to mean executor or administrator, and to exclude any direct action by the widow or children of the decedent.[42]

In the original petition (i.e., complaint) below,[43] petitioner did not allege that she was the duly qualified and appointed administratrix or executrix of the estate of the decedent. This fundamental lack of capacity to sue was called to the attention of petitioner and of the court below, *in limine*, by respondent's exceptions.[44] On the trial of the exception of no right of action, petitioner, under Louisiana procedure, had the opportunity to present proof[45] of her capacity to sue, but none was adduced, obviously because she had

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[40] *American Railroad Co. of Porto Rico v. Birch*, 224 U.S. 547; *Pecos & Northern Texas Railway Co. v. Rosenbloom*, 240 U.S. 439; *Missouri, Kansas & Texas Railway Co. v. Wulf*, 226 U.S. 570; *St. Louis, San Francisco, & Texas Railway Co. v. Seale*, 229 U.S. 156; *Jenkins v. Pullman Co.*, 96 F.2d 405, (9 Cir.) *aff'd.* 305 U.S. 534; *Civil v. Waterman SS Corp.*, 217 F.2d 94 (2 Cir.); *Guinther v. Philadelphia & Reading Railway Co.*, 1 F.2d 85 (3 Cir.); *Marshall v. N.Y. Central R. Co.*, 218 F.2d 900 (7 Cir.); *Phillips v. Houston Fire & Cas. Ins. Co.*, 219 F.Supp. 420 (W.D. La.).

[41] *Ibid.*

[42] *Penny v. N.O. G. N. Railroad Co.*, 135 La. 962, 66 So. 313.

[43] R. 1-5.

[44] R. 7.

[45] Louisiana Code of Civil Procedure, Articles 927 and 931 (See Appendix).

not qualified—and, so far as is known, no one else had qualified—as administratrix or executrix of the decedent's estate. The court below, it is submitted, correctly disposed of the Jones Act claim on this vital basis: petitioner is not the party in whom the right to make a claim under that act is vested.

In addition, it is specifically alleged the decedent was employed "as a longshoreman, assigned to work on the aforementioned vessel(s) aboard the same, engaged in cargo operations."[46] While the question of whether a particular employee is or is not a "seaman" is usually a question of fact for the trier of the facts,[47] that cannot be said to be the situation with regard to longshoremen engaged in the cargo operations of the vessel. We submit that this question has long been settled, as a matter of law, against petitioner.[48]

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[46] R. 1.

[47] Cf. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187; *South Chicago Coal & Dock Co. v. Bassett, supra; Gianfala v. Texas Company*, 350 U.S. 879, reversing, *per curiam* 222 F.2d 382 (5 Cir.). In no such case, however, was a longshoreman involved. The longshoreman's occupation is precisely the principal occupation which the act was passed to cover.

[48] *Swanson v. Marra Bros.*, 328 U.S. 1, in which, 328 U.S. at 6, the unanimous Court said of the Longshoremen's Act:

> "The Act both imposes liability on the employer for injuries on navigable waters to employees not including the master or members of a crew of a vessel, and makes the prescribed liability to employees within the coverage of the Act exclusive. The Act thus excludes from its benefits stevedores not members of the crew who are injured on navigable waters from recovering under the Jones Act as interpreted by the Haverty Case."

In *South Chicago Coal & Dock Co. v. Bassett*, note 17, *supra*, in which, 309 U.S. at 256, the unanimous Court said:

> "The legislative history of the exception now before us throws light upon the intention of Congress. For those employees who are entitled to compensation, the remedy

Petitioner's reliance on *International Stevedoring Company v. Haverty*,[49] decided prior to the Longshoremen's Act, is misplaced. The act was adopted promptly thereafter to remove longshoremen from the status of seamen, and to give them the benefits of compensation. Since then, this court has consistently held that the Longshoremen's Act clearly removed the longshoreman from the application of the Jones Act.[50]

The suit, insofar as it purports to claim under the Jones Act, is brought by an improper party; and, in any event, the Jones Act has no application to longshoremen.

CONCLUSION.

We submit that this Court should hold that the Longshoremen's Act is petitioner's exclusive remedy; that *Reed v. Yaka*, a typical *Ryan* third party longshoreman case, does not control this case, since this is an action for death, directly against the employer, with no third party and no third party's vessel involved; that there is no basis whatsoever for ignoring the plain provisions of Section 5 of the Longshoremen's Act; that to allow damages in this situation would be a judicial repeal of Section 5 of the Long-

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under the Act is exclusive. §5. This made inapplicable to such employees the provision of §33 of the Merchants Marine Act (called the Jones Act) which carried to 'seaman' at their election the benefit of the Federal Employers' Liability Act."

See also *Norton v. Warner Co.*, note 17, *supra*.

[49] 272 U. S. 50.

[50] See footnote 48, *supra*.

shoremen's Act and would undermine the constitutionality of that act; that the petitioner is not the proper party to bring a Jones Act action, and that, further, as a matter of law, the Jones Act does not provide a remedy for the death of a longshoreman.

Accordingly, the decisions of the courts below were correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I, Benjamin W. Yancey, a member of the bar of this Court, do hereby certify that copies of the foregoing brief have been served upon petitioner by mailing same to petitioner's counsel of record, Charles R. Maloney, Esquire, 816 Richards Building, New Orleans, Louisiana, 70112, first class mail, postage prepaid, at New Orleans, Louisiana on this ... day of March, 1967.

BENJAMIN W. YANCEY.

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I.

Longshoremen's and Harbor Workers' Compensation Act.

(a) 33 U.S.C. Sec. 903:

Coverage:

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(b) 33 U.S.C. Sec. 905:

Exclusiveness of liability:

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

(c) 33 U.S.C. Sec. 933:

Compensation for injuries where third persons are liable:

(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

(c) The payment of such compensation into the fund established in section 944 of this title shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third person.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner);

(B) the cost of all benefits actually furnished by him to the employee under section 907 of this title;

(C) all amounts paid as compensation;

(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907 of this title, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

(f) If the person entitled to compensation institutes proceedings within the period prescribed in subdivision (b) of this section the employer shall be required to pay as compensation under this chapter a sum equal to the excess of the amount which the Secretary determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this chapter, the employer shall be liable for compensation as determined in subdivision (f) of this section only if such compromise is made with his written approval.

(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

(i) The right to compensation or benefits under this chapter shall be the exclusive remedy to an employee when he is injured, or to his eligible survivors or legal representatives if he is killed, by the negligence or wrong of any other person or persons in the same employ: *Provided,* That this provision shall not affect the liability of a person other than an officer or employee of the employer.

II.

Jones Act, 46 U.S.C. Sec. 688.

Recovery for injury to or death of seaman:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the

death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

III.

Louisiana Revised Civil Code, Article 2315.

Liability for acts causing damage; survival of action:

Art. 2315. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the

surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively.

IV.

Louisiana Code of Civil Procedure.

(a) Article 927:

Objections raised by peremptory exception:

The objections which may be raised through the peremptory exception include, but are not limited to, the following:

(1) Prescription;

(2) Res judicata;

(3) Nonjoinder of an indispensable party;

(4) No cause of action; and

(5) No right of action, or no interest in the plaintiff to institute the suit.

The court cannot supply the objections of prescription and res judicata, which must be specially pleaded. The nonjoinder of an indispensable party, or the failure to disclose a cause of action or a right or interest in the plaintiff to institute the suit, may be noticed by either the trial or appellate court of its own motion.

(b) Article 931:

Evidence on trial of peremptory exception:

On the trial of the peremptory exception pleaded at or prior to the trial of the case, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition.

When the peremptory exception is pleaded in the trial court after the trial of the case, but prior to a submission for a decision, the plaintiff may introduce evidence in opposition thereto, but the defendant may introduce no evidence except to rebut that offered by plaintiff.

No evidence may be introduced at any time to support or controvert the objection that the petition fails to state a cause of action.

SUPREME COURT OF THE UNITED STATES

No. 575.—October Term, 1966.

Helen Jackson, Petitioner,
v.
Lykes Bros. Steamship Co., Inc.

On Writ of Certiorari to the Supreme Court of Louisiana.

[May 8, 1967.]

Mr. Justice Black delivered the opinion of the Court.

Luther Jackson, employed by Lykes Bros. Steamship Company, inhaled noxious gases and died while working as a longshoreman on a Lykes vessel on navigable waters. His widow, Helen Jackson, filed this action against Lykes in the Louisiana State Trial Court claiming that her husband's death was proximately caused either by Lykes' negligence in operating the ship or by the ship's unseaworthiness. Lykes moved to dismiss on the ground that § 5 of the Federal Longshoremen's and Harbor Workers' Compensation Act provides that compensation benefits required by that Act to be given by an employer to a longshoreman or his representative for "injury or death" "shall be exclusive and in place of all other liability of such employer to the employee."[1] The trial

[1] 33 U. S. C. § 905 provides:

"The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death. . . ."

33 U. S. C. § 933 also provides compensation for injuries where third persons are liable:

"(c) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer

court, sustaining Lykes' motion on the ground assigned in it, dismissed petitioner's suit and the State Court of Appeal, Fourth Circuit, affirmed. 185 So. 2d 342. The Supreme Court of Louisiana finding "no error of law," denied a writ of certiorari. 249 La. 460, 187 So. 2d 441. We granted certiorari because it appeared that, in deciding as they did, the Louisiana courts had failed to follow our holding in *Reed* v. *The Yaka*, 373 U. S. 410.[2]

The crucial facts in *Reed* v. *The Yaka* present facts strikingly similar to those in the present case. Reed, a longshoreman, covered by the Federal Longshoremen's and Harbor Workers' Compensation Act, was injured while loading a ship. The ship was owned by the Waterman Steamship Corporation but was being operated by a bareboat charterer as owner *pro hac vice* who had directly employed Reed to work on the ship as a longshoreman. When Reed filed his suit for damages *in rem* against the

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or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person."

[2] The Court of Appeal, Fourth Circuit, affirmed the lower court's dismissal. That court, construing our recent opinion in *Reed* v. *The Yaka*, 373 U. S. 410, as permitting only an action against a vessel owned by an employer, concluded that the exclusive remedy provisions of the Longshoremen's and Harbor Workers' Compensation Act precluded petitioner from bringing a personal action against the shipowner employer. In so holding the Court of Appeal, Fourth Circuit, stated:

"An analysis of the Yaka case reveals language which suggests that an in personam remedy may be available; the analysis likewise reveals that there exists reason for believing that the section of the Longshoreman's and Harbor Worker's Act referred to herein above has been taken upon the judicial anvil and hammered into an unexpected shape. . . . In any event, we are of the opinion that it exemplifies more judicial integrity to conclude that the rationale emanating from Yaka merely permits a longshoreman to bring an action in rem against his employer in the federal court." 185 So. 2d, at 345.

ship, the ship defended on the ground that Reed being a longshoreman could not bring a personal action against the employer-owner *pro hac vice* because of the Longshoremen's Act's exclusive recovery features and consequently he could not sue the ship. We rejected this contention on the express ground that Reed could sue the owner *pro hac vice* personally despite the Federal Longshoremen's Act and despite the fact that the owner *pro hac vice* was his employer.

We held in *Yaka* that a longshoreman employed by a shipowner as a longshoreman could sue the owner for the ship's unseaworthiness. In doing so we pointed out that in *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85,[3] and other cases following it, a group of maritime workers including stevedores, carpenters, and longshoremen, although employed by an independent contractor to work on the ship, were allowed to sue the owner for unseaworthiness of its ship.[4] We also pointed out in *Yaka*

[3] *Sieracki* extended the doctrine of unseaworthiness to longshoremen, even though the longshoreman was not a member of the crew, and in spite of the fact that the longshoreman was entitled to compensation benefits under the Longshoreman's and Harbor Worker's Act.

[4] In 1953 this Court held in *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, that other kinds of maritime employees, besides stevedores, who performed jobs formerly done by seamen were entitled to the seaworthiness protection given in *Sieracki*. There we said:

"It is pointed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of unseaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unsea-

that in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U. S. 124, this Court had permitted a shipowner, sued by a longshoreman who had been directly hired by an independent stevedore employer under these circumstances, to bring an action over and recover from the independent stevedore employer despite the fact that the liability of the stevedore employer under the Longshoremen's Act "shall be exclusive and in place of all other liability." *Yaka* also stressed the fact that the traditional humanitarian remedy for unseaworthiness was not to be destroyed by the kind of employment contract that a shipowner made with the people who worked on it.

In this case as in *Yaka*, the fact that the longshoreman was hired directly by the owner instead of by the independent stevedore company makes no difference as to the liability of the ship or its owner. In the final analysis the contention here against recovery as in *Yaka* is that the longshoreman who is employed to work on a ship by an independent stevedore company instead of the shipowner can recover for the unseaworthiness of the vessel, but a longshoreman hired by the same shipowner

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worthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law." 346 U. S., at 412–413.

Subsequent decisions in line with the general concepts put forth by this Court have read *Sieracki* expansively, and a wide range of maritime employees have been granted the benefits of the unseaworthiness doctrine. Carpenters (*Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406); electricians (*Feinman* v. *A. H. Bull S. S. Co.*, 216 F. 2d 393); Shipcleaners (*Torres* v. *The Kastor*, 227 F. 2d 664), and *Crawford* v. *Pope & Talbot, Inc.*, *supra*, note 39); repairmen (*Read* v. *United States*, 201 F. 2d 758); and riggers (*Amerocean S. S. Co.* v. *Copp*, 245 F. 2d 291), who performed jobs formerly done by Seamen, have recovered from shipowners on the unseaworthiness doctrine. See 75 Yale L. J. 1174, 1183.

to do exactly the same kind of work on an unseaworthy ship cannot recover. We reject this contention as we did before.[5] We cannot accept such a construction of the Longshoremen's Act—an Act designed to provide equal justice to every longshoreman similarly situated. We cannot hold that Congress intended any such incongruous, absurd, and unjust result in passing this congressional Act.

We adhere to *Yaka* and hold that the Louisiana courts committed error in dismissing petitioner's claim. Louisiana courts have broad jurisdiction of admiralty cases such as this and have frequently exercised it. In this situation it is the duty of the Louisiana courts to adjudicate this case. The judgment is reversed and remanded for trial and further proceedings in the Louisiana courts not inconsistent with this opinion. *Testa* v. *Katt*, 330 U. S. 386; *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U. S. 1; *Claflin* v. *Houseman*, 93 U. S. 130. See *Garrett* v. *Moore-McCormack*, 317 U. S. 239.

It is so ordered.

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[5] *Reed* v. *The Yaka*, 373 U. S., at 415.

"We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company."

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SUPREME COURT OF THE UNITED STATES

No. 575.—October Term, 1966.

Helen Jackson, Petitioner, v. Lykes Bros. Steamship Co., Inc. } On Writ of Certiorari to the Supreme Court of Louisiana.

[May 8, 1967.]

Mr. Justice Stewart, whom Mr. Justice Harlan joins, dissenting.

Luther Jackson was a longshoreman. He died from injuries received in the course of his employment. A federal law clearly imposes an absolute obligation upon his employer to pay compensation to his widow.[1] The law's humanitarian purpose is to ensure that all shall be compensated, regardless of the employer's fault. That law just as clearly provides that the employer's statutory obligation to pay this compensation "shall be exclusive and in place of all other liability . . . at law or in admiralty."[2] Nonetheless, Jackson's widow brought this admiralty action against his employer in Louisiana. The state courts dismissed the action, holding that the federal law means what it says.

The Court today holds that this federal law cannot mean what it says, because this would lead to an "incongruous, absurd, and unjust result." The Court says that the result it reaches is dictated by its prior decision in *Reed* v. *Yaka*, 373 U. S. 410. The Louisiana courts thought that the *Yaka* case, which involved the intervention of a third party, was distinguishable, and so do I. But in any event I would decide this case on its own facts under the law as it was clearly written by Congress.

[1] Longshoremen's and Harbor Workers' Compensation Act, §§ 4, 9, 44 Stat. 1426, 1429, 33 U. S. C. §§ 904, 909.

[2] *Id.*, § 5, 44 Stat. 1426, 33 U. S. C. § 905.

Congress, in setting up a federal system of workmen's compensation for longshoremen, imposing liability without fault upon employers, provided that this should be the exclusive remedy against the employer himself. I cannot agree that the law Congress passed is either "incongruous," "absurd," or "unjust." If it is, then so are the workmen's compensation laws of 49 States, all of which contain the same basic provision.[3]

But even if I could agree with the Court's characterization of the law that Congress has written, I could never agree with the Court's judgment. It is our duty to apply the law, not to repeal it.

I respectfully dissent.

[3] See 1 Schneider, Workmen's Compensation, §§ 89–154 (3d ed.).